TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 270

[redacted] VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, AND TEXARKANA & FORT SMITH RAILWAY COMPANY, PLAINTIFFS IN ERROR,

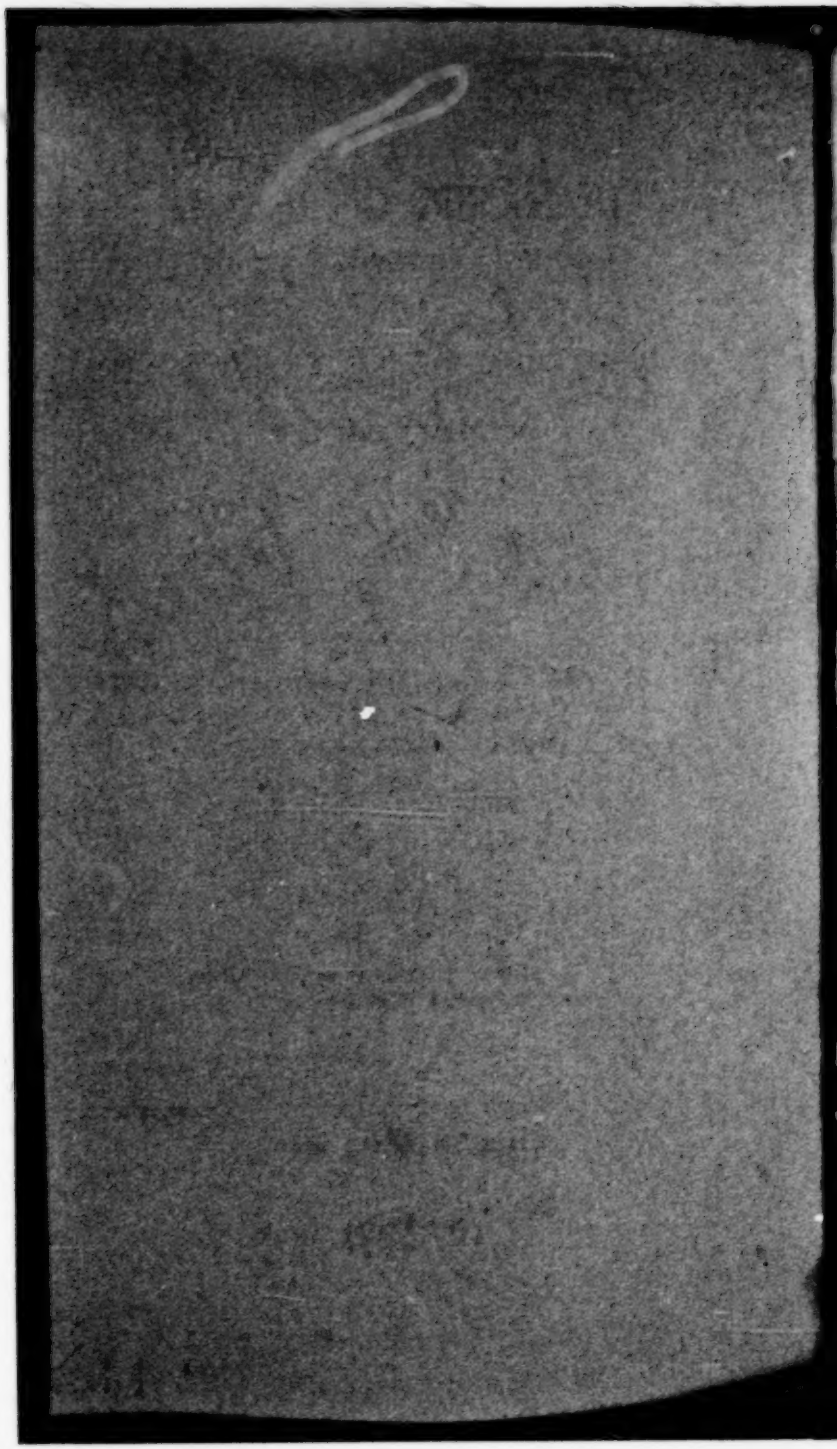
vs.

ANDERSON-TULLY COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MARCH 5, 1920.

(27,833)



(27,532)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 777.

THE VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, AND TEXARKANA & FORT SMITH RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

ANDERSON-TULLY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1920.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals, Fifth Judicial Circuit. Begun on the Third Monday in November, A. D. 1919, at New Orleans, Louisiana, Before the Honorable Richard W. Walker, Circuit Judge, and the Honorable Rufus E. Foster and the Honorable William I. Grubb, District Judges.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et al., Plaintiffs in Error,

versus

ANDERSON-TULLY COMPANY, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 17th day of April, A. D. 1919, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the United States for the Southern District of Mississippi, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3388, as follows, to-wit:

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et als., Plaintiffs in Error,

versus

ANDERSON-TULLY COMPANY, Defendant in Error.

Error to the District Court of the United States for the Southern District of Mississippi.

[Original Record Filed April 17, 1919.]

U. S. Circuit Court of Appeals. Filed May 10, 1919. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, KANSAS CITY SOUTHERN RAILWAY COMPANY, & TEXARKANA & FORT SMITH RAILWAY COMPANY,
Defendants, Plaintiffs in Error,

versus

THE ANDERSON-TULLY COMPANY,
Plaintiff, Defendant in Error.

On Writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit.

TRANSCRIPT OF RECORD.

Caption.

BE IT REMEMBERED, That at a regular term of the District Court of the United States, in the Fifth Circuit thereof, and in the Western Division of the Southern District of Mississippi, at Vicksburg, begun and holden in the City of Vicksburg, Mississippi, on the 6th day of January, 1919, and which term adjourned on the 10th day of January, 1919, the Honorable Edwin R. Holmes, United States District Judge for the State of Mississippi, presiding, the following proceedings were had, and the following case came on for trial and was tried:

The Anderson-Tully Company
vs. No. 324.
Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company, & Texarkana & Fort Smith Railway Company.

2 PETITION FOR JUDGMENT UPON AWARD OF REPARATION BY INTERSTATE COMMISSION.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a Corporation,
vs. No. .. At Law.
The Vicksburg, Shreveport & Pacific Ry. Co., Kansas City Southern Ry. Co., and Texarkana & Ft. Smith Ry. Co.

Petition for Judgment Upon Award of Reparation by Interstate Commerce Commission.

To the Honorables, the Judges of the District Court of the United States for the Southern District of Mississippi:

Your petitioner, The Anderson-Tully Company, a corporation organized under the laws of the State of Michigan, respectfully petitioning, shows Your Honors:

1.

Your petitioner is lawfully and rightfully entitled to receive and does hereby claim against the Vicksburg, Shreveport & Pacific Railway Co., a corporation organized under the laws of the State of Louisiana, but operating a part of its road within the County of Warren, State of Mississippi, and against the Kansas City Southern Ry. Co., a corporation organized under the laws of the State of Missouri with its main office in the City of Kansas City, Missouri, and against the Texarkana & Ft. Smith Ry. Co., a corporation organized under the laws of the State of Texas with its main office in the city of Texarkana, the sum of six thousand seven hundred and fifty-six 4/100 ($6756.04) dollars, together with the interest thereon from the 8th day of July, 1918, at the rate of 6% per annum, as for their damage and reparation, in ac-

cordance with a report and order of the Interstate Commerce Commission, dated July 8th, 1918, docket number 3537, opinion number 3332, a copy of which opinion is hereto appended and marked Exhibit "A," a copy of the order thereon issued is hereto appended and marked Exhibit "B," and in accordance with the several acts
3 of Congress in such case made and provided; and the petitioner shows that the defendants, jointly and severally, justly and legally owe to the petitioner the sum set forth above, together with the legal interest from the 8th day of July, 1918, and a reasonable attorney's fee to be taxed as part of the costs against said defendants.

II.

The petitioner is a corporation organized under the laws of the State of Michigan and a citizen and resident of said State; and the defendants are corporation of the States of Louisiana, Texas and Missouri as hereinbefore set out.

Prior to all the dates and during all the periods of time named in this petition, the petitioner was engaged in the business of making, selling and shipping box shooks from its mill in the city of Vicksburg, State of Mississippi, to Fort Arthur, in the State of Texas, the said business involving the shipment of large quantities of box shooks over the lines operated by the defendants from Vicksburg to Port Arthur.

At all times herein mentioned the defendants were and still are railroad corporations, organized and existing under the laws of the States of Louisiana, Texas and Missouri, having their principal operating offices in the Cities of Kansas City, Missouri, Shreveport, Louisiana, and Texarkana, Texas, and were common carriers engaged in interstate railroad transportation of passengers and property between the points of Vicksburg, Mississippi, and Port Arthur, Texas, over their own lines of road, as well as over other lines owned, leased, controlled and operated by them.

III.

The petitioner, under date of February 14th, 1913, filed a formal complaint to the Interstate Commerce Commission showing that the rate of freight which it had been charged from Vicksburg, Mississippi, to Port Arthur, Texas, was twenty (20) cents per hundred pounds and that said rate was unreasonable, to the extent that it exceeds sixteen (16) cents, an aggregate of the contemporaneously applicable intermediate rates based on Delta Point, Louisiana. The petitioner prayed for compensation and reparation on the past shipments
4 which had paid the twenty (20) cent rate.

The complaint was heard in Chicago, November 4th, 1913, and the Interstate Commerce Commission found that reparation was due, but no order was entered, as the record was insufficient. A rehearing was granted and the Interstate Commerce Commission affirmed its former findings, as set out in 39 ICC 734. Complainant prepared a detailed statement of shipments upon which reparation was claimed, a copy of which statement is hereto attached and marked Exhibit "C." The defendants refused to certify that the shipments consisted of box shooks, insisting that they consisted of box material, on which the aggregate of the intermediate rates was eighteen (18) cents. The case was thereupon assigned for further hearing for the purpose of determining the amount of reparation due.

Further proof was taken upon this point and the case was submitted on the 30th day of March, 1918, and on the 8th day of July, 1918, an opinion was handed down by the Interstate Commerce Commission, marked Exhibit "A" and an order was entered on said date, marked Exhibit "B" holding that petitioner was entitled to reparation in the sum of four thousand nine hundred and six 48/100 ($4,906.48) dollars, together with interest thereon at the rate of 6% per annum from the 14th day of March, 1912, as reparation on account of an unreasonable rate exacted for the transportation of various car

loads of box shooks from Vicksburg, Mississippi, to Port Arthur, Texas, the details of said shipments being set out on Exhibit "C."

IV.

Said opinion and order required that the defendants should pay to the complainant on or before September 16th, 1918, the sum of four thousand nine hundred and six 48/100 ($4,906.48) dollars, with interest thereon at the rate of 6% per annum from March 14th, 1914, and said order was duly served upon the Defendants in the above entitled cause and demand made that the defendants pay the petitioners the sum claimed in this petition, and as set forth in the original orders of the Interstate Commerce Commission, Exhibit "A" and Exhibit "B" hereto attached, but the defendants have wholly
5 failed, neglected and refused to pay the said sum or any part thereof and no such sum or any part thereof has been paid by the defendants, or any one of them on their behalf to petitioner or to any one on his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order, legally and lawfully made under the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory or supplementary thereto.

Wherefore, the said petitioner, the Anderson-Tully Co. respectfully prays:

First. That your Honorable Court enter a rule and order upon the said defendants, the Vicksburg, Shreveport & Pacific Ry. Co., the Kansas City Southern Railway Co., and the Texarkana & Ft. Smith Ry. Co., to file their several bills, answers or demurrers to this petition within thirty days from date of service of a copy of the same upon said defendants.

Second. That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce, aforesaid.

Third. That your Honorable Court will hear, determine and adjudicate the matters involved in this cause hereinabove recited and the Exhibits hereto attached.

Fourth. That your Honorable Court will enter judgment in favor of the petitioner and against the said defendants, the Vicksburg, Shreveport & Pacific Railway Co., the Kansas City Southern Railway Co., and the Texarkana & Ft. Smith Railway Co., for the sum of six thousand seven hundred and fifty-six 4/100 ($6,756.04) dollars together with interest thereon from the 8th day of July 1918, and costs, including a reasonable attorney's fee.

Fifth. That your Honorable Court may make such other order or orders in the premises as the necessities of the case may require or as to your Honorable Court may seem meet.

And your petitioner as in duty bound will ever pray, etc.

ANDERSON TULLY COMPANY,
By R. G. BROWN, Atty.
R. G. BROWN and H. B. ANDERSON,
Attorneys.

6 State of Tennessee,
County of Shelby, ss.

S. B. Anderson, being duly sworn deposes and says that he is the president of the Anderson-Tully Company, the petitioner in the above entitled cause and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

S. B. ANDERSON.

Sworn to and subscribed before me, this 27th day of November, 1918.

R. G. BROWN,
Notary Public.

My commission expires November 9th, 1922.

EXHIBIT A.

Interstate Commerce Commission.

Anderson Tully Company,

v. No. 5537.

Alabama & Vicksburg Railway Company, et al.

Submitted March 30, 1918. Decided July 8, 1918.

Reparation awarded on shipments of box shooks, in car loads, from Vicksburg, Miss., to Port Arthur, Texas.

Brown & Anderson and B. G. Brown for Complainant.
J. M. Souby for Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

Report of the Commission on Rehearing.

By the Commission:

In our original decision in this case, unreported, we found that the joint rate of 20 cents per 100 pounds applicable on numerous carloads of box shooks shipped within the statutory period from Vicksburg, Miss., to Port Arthur, Texas, by way of the Vicksburg, Shreveport & Pacific Railway Co., Shreveport, La., and the Kansas City Southern and the Texarkana & Fort Smith railways beyond, was unreasonable to the extent that it exceeded 16 cents, the aggregate of the contemporaneously applicable intermediate rates based on Delta Point, La. Reparation was found due, but no order was entered as the record was insufficient. The customary statement from complainant relative to shipments and its verification by the defendants was required. Upon rehearing we affirmed our former findings, 39 ICC 734. Complainant prepared a detailed statement of the shipments upon which reparation is claimed, but the defendants refused to certify that the shipments consisted of box shooks, insisting that they consisted of box material, upon which the aggregate of the intermediate rates was 18 cents. The case was thereupon assigned for further hearing for the purpose of determining the amount of reparation due.

Complainant's witnesses, experienced in the manufacture of box shooks, testified that box shooks are the parts of wooden boxes—that is, the ends and side pieces, tops and bottoms—in such shape that it is only necessary to nail the parts together to produce the finished box, and that box material is a broader term, including box shooks and other articles, such as the rough lumber from which the shooks are manufactured. The standard dictionary defines shooks as follows: (1) A collection of staves, shaped and chamfered, and bound in form for transportation; and (2) a set of boards in order for nailing together into a packing box and conveniently bundled for transportation. It does not define the term box shooks. The evidence shows that the shipments upon which reparation is claimed consisted of complete sets of box parts, each box intended to contain two five gallon cans of oil; that they were invoiced as shooks; that no further process was necessary to produce the finished boxes except nailing; that the purchaser nailed the parts together by an automatic nailing machine; that the parts were tied in bundles, each bundle containing the same kind of pieces; and that each car contained the parts for about 5,000 complete boxes. No evidence was introduced for the defendants at the rehearing. Reference was made to the fact that the shipments were billed as box material. As that term includes box shooks and as the evidence conclusively shows that the shipments consisted of box shooks, the fact that they were billed as box material is of no particular significance.

We find that the shipments consisted of box shooks; that the complainant, a corporation, made the shipments as described in our original report and paid and bore the charges thereon; that it was damaged to the extent of the difference between the charges paid and those that would have accrued at the rate found reasonable; and that it is entitled to reparation in the sum of $4,906.48, with interest.

An appropriate order will be entered.

Exhibit A.

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EXHIBIT B.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of July, A. D. 1918.

Anderson-Tully Company,

v. No. 5537.

Alabama & Vicksburg Railway Company; Vicksburg, Shreveport & Pacific Railway Company, The Yazoo & Mississippi Valley Railway Company; New Orleans, Texas & Mexico Railroad Company; The Kansas City Southern Railway Company; and Texarkana & Fort Smith Railway Company.

It appearing, that on May 19, 1916, the Commission rendered its report on rehearing in the above entitled proceedings, and that subsequently this proceeding was assigned for further hearing on the question of reparation, and such further hearing having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that defendants, Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, be and they are hereby authorized and directed to pay unto Complainant, Anderson Tully Company, on or before September 16, 1918, the sum of $4,906.48, with interest thereon at the rate of 6% per annum from March 14, 1912, as reparation on account of an unreasonable rate exacted for the transportation of various car loads of box shooks from Vicksburg, Miss., to Port Arthur, Tex.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

Exhibit B.

Date Shipment.	From	Destination	Car Number		Routed	Weight	Charges Collected	Reparation at 4c per 100#
10	1912.					Brought forward		$4288.80
	Vicksburg,	Port Arthur			V.S&P K.C.S			
8-31	Miss.	Tex.	Mo.Pac.	31567	T. & Ft. S.	51200	$102.40	20.48
9-4	"	"	L.V.	68414	"	51200	102.40	20.48
9-6	"	"	CofN.J.	12255	"	57000	114.00	22.80
9-19	"	"	CH&D	17971	"	48800	97.60	19.52
9-24	"	"	AT&SF	8499	"	74300	148.60	29.72
10-23	"	"	NYC&HR	56752	"	49500	99.00	19.80
11-11	"	"	ACL	37390	"	54600	109.20	21.84
11-15	"	"	DL&W	29842		61600	123.20	24.64
11-16	"	"	A&WP	2704		55800	111.60	22.32
11-20	"	"	P&R	2353		54800	109.60	21.92
12-2	"	"	CB&Q	103353		60900	121.80	24.36
12-17	"	"	Penn.	85432		52000	104.00	20.80
12-23	"	"	CM&STF	85432		69400	138.80	27.76
12-26	"	"	LS&MS	86550		67200	134.40	26.88
12-26	"	"	GT	8776		58500	117.00	23.40
12-31	"	"	CRI&P	52566		49800	99.60	19.92
12-31	"	"	ACL	34323		55100	110.20	22.04
12-31	"	"	MoPac	33867		64100	128.20	25.64

1913	Vicksburg,	Port Arthur					
1-2	Miss.	Tex.	Sou	38686	55300	110.60	22.12
1-7	"	"	CM&STP	55776	50700	101.40	20.28
1-9	"	"	GT	12714	60000	120.00	24.00
2-17	"	"	Wabash	63329	56900	113.80	22.76
2-22	"	"	ACL	25482	55500	111.00	22.20
2-25	"	"	Sou	39083	60200	120.40	24.08
2-26	"	"	CB&Q	107466	67500	135.00	27.00
3-22	"	"	WJS	90522	44100	88.20	17.64
4-11	"	"	Erie	108766	58200	116.40	23.28

$4906.48

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....., Attorney for Anderson-Tully Co.

I hereby certify that this statement has been checked against the records of this company and found correct.

....., Auditor, Texarkana & Ft. Smith Railway Co.

Exhibit "C."

Indorsement—Filed Dec. 2, 1918.

11 United States of America.
Western Division of the Southern District of Mississippi.

The President of the United States.

To the Marshal of the Southern District of Mississippi, Greeting:

We command you, that without delay, you summon the Vicksburg, Shreveport & Pacific Railway Co., a corporation organized under the laws of the State of Louisiana, but operating part of its road within the County of Warren, State of Mississippi, Defendant, residing in said division of said district, and citizen of the State of Mississippi, that it be and appear at the District Court of the United States, to be held at the Court Room thereof, in the City of Vicksburg, Miss., in and for the Division of the Southern District of Mississippi, on the 1st Monday of January, 1919, next, to answer The Anderson Tully Company, a corporation organized under the laws of the State of Michigan, on a Petition for Judgment upon award of reparation by Interstate Commerce Commission, and that it do file its plea or defense in said Court on or before the said meeting thereof, or Judgment will be given against it by default; and have you then and there this writ, and how you have executed the same.

Witness the Honorable Edwin R. Holmes, Judge of the District Court of the United States and the seal of our said District Court this 2 day of December, A. D. 1918.

JACK THOMPSON, Clerk.

(Seal) J. H. SHORT, D. C.

Marshal's Return.

Executed by handing a true copy of this summons and petition for judgment to Austin King, Freight Agent for V S & P R R Co, Vicksburg, Miss., Dec. 4, 1918.

JOHN G. CASHMAN,
U. S. M.

By FREENEY, Deputy.

Indorsed—Returned, executed, filed and entd. 12/7/1918.

12 Summons.

United States of America,
Western Division of the Southern District of Mississippi, Sc.

The President of the United States.
To the Marshal of the Western District of Missouri;

Greeting:

We command you, that without delay, you summon Kansas City Southern Railway Company, a corporation organized under the laws of the State of Missouri, with its main office in the City of Kansas City, Missouri, defendant, that it be and appear at the District Court of the United States to be held at the Court Room thereof, in the City of Vicksburg, Mississippi, in and for the Division of the Southern District of Mississippi, on the first Monday of January, 1919, next, to answer The Anderson-Tully Company, a corporation organized under the laws of the State of Michigan, on a .... the said Kansas City Southern Railway Co., Petition filed against it and Vicksburg, Shreveport & Pacific Ry. Co., and Texarkana & Ft. Smith Ry. Co., defendants, for Judgment upon award of reparation by the Interstate Commerce Commission and that it do file its plea or defense in said Court on or before the said meeting thereof, or judgment will be given against it by default; and have you then and there this writ, and how you have executed the same.

Witness, the Honorable Edwin R. Holmes, Judge of the District Court of the United States, and the Seal of our said District Court, this 2 day of December, A. D. 1918.

Signed JACK THOMPSON, Clerk.
J. H. SHORT, D. C.

Marshal's Return.

Western Division, Western District of Missouri.

I hereby certify that I executed this writ by delivering a true copy of the summons together with a true copy of the petition to A. M. Calhoun as Assistant to the Federal Manager of the Kansas City Southern Railway at Kansas City, Jackson County, Missouri, on December 5, 1918, in said Division and District.

W. A. SHELTON,
United States Marshal.
By SID J. HAMILTON, Deputy.

Marshal's Fees	$2.00
Expenses	.12
Total	$2.12

13 Indorsement—Returned, executed, filed and entered, 12/9/18.

Summons.

14 United States of America,
Western Division of the Southern District of Mississippi, &c.

The President of the United States.
To the Marshal of the Eastern District of Texas, Greeting:

We command you, that without delay, you summon Texarkana & Ft. Smith Ry. Co., a corporation organized under the laws of the State of Texas, with its main office in the City of Texarkana, Texas, defendant, that it be and appear at the District Court of the United States, to be held at the Court Room thereof, in the City of Vicksburg, Mississippi, in and for the Division of the

Southern District of Mississippi, on the 1st Monday of January, 1919, next to answer the Anderson-Tully Company, a corporation organized under the laws of the State of Michigan, on a petition filed against said Texarkana & Ft. Smith Ry. Co., Vicksburg, Shreveport & Pacific Ry. Co., and Kansas City Southern Railway Co., defendants, for judgment upon award of reparation by Interstate Commerce Commission, and that it do file its plea or defense in said Court on or before the said meeting thereof, or judgment will be given against it by default; and have you then there this writ, and how you have executed the same.

Witness the Honorable Edwin R. Holmes, Judge of the District Court of the United States, and the Seal of our said District Court, this 2 day of December, A. D. 1918.

(Seal)

JACK THOMPSON, Clerk,
J. H. SHORT, D. C.

Marshal's Return.

Received this writ on the 5th day of December, 1918, at Texarkana, Texas, and executed it on the 6th day of December, 1918, at Texarkana, Texas, by delivering in person to W. R. Grim, Vice President & Treasurer of the Texarkana & Fort Smith Railway Company, at Texarkana, Texas, copy of this writ together with the petition.

B. F. SHERRELL,
U. S. Marshal,

By W. B. HARPER,
Chief Deputy U. S. M.

15 Indorsement—Returned, executed, filed and entered, 12/9/18.

16 PLEA IN ABATEMENT & TO THE JURISDICTION.

United States District Court, Western Division of the Southern District of Mississippi.

Anderson Tully Company, Plaintiff,
v.
Vicksburg, Shreveport & Pacific Railway Company and the Kansas City Southern Railway Company.

The defendants, the Vicksburg, Shreveport & Pacific Railway Company and the Kansas City Southern Railway Company, for plea in abatement and to the jurisdiction of the Court, shows:

1. These defendants are not citizens or residents of the Western Division of the Southern District of Mississippi or of the State of Mississippi; nor was either of them a resident or citizen of said State when this suit was begun, or at any time since.

2. These defendants do not own or operate a railroad or a railroad track, or any part of such track, in said district or State, and neither owned nor operated a railroad, or a part of a railroad or a railroad track or a part of such track, in the State of Mississippi when this suit was instituted or for many months before this suit was begun, nor at any time since.

3. These defendants did not have, nor did either of them have, an agent of any kind whatever in the State of Mississippi when this suit was instituted, or for several months before or at any time since this suit was begun, and ..... and ..... and the persons on whom it is claimed the summons issued in this case were served was not the agent of either of these defendants at the time it is claimed the writ was served on him.

4. These defendants were not carrying on business of any kind in the State of Mississippi when this suit was begun, nor did either of them carry on or transact business of any kind in said state of Mississippi for several months before the beginning of this suit and neither defendant has carried on or transacted business in said State at any time since this suit was begun.

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This defendants are ready to verify; wherefore they pray to be hence discharged with their reasonable costs in this behalf expended.

S. W. MOORE,
J. C. THEUS,
Attorneys for Defendants.

J. C. Theus being by me duly sworn says: That he is attorney for the Vicksburg, Shreveport and Pacific Railway Company and Kansas City Southern Railway Company; that the officers and agents of said corporations authorized to make this affidavit are absent from the Western Division of the Southern District of the United States District Court of the State of Mississippi, and that all of the allegations of fact contained in the foregoing plea are true to the best of his information, knowledge and belief.

J. C. THEUS.

Sworn to and subscribed before me on this the 6th day of January, 1919.

(Seal)

JACK THOMPSON,
Clerk United States Court.

Indorsed: Filed Jany. 6, 1919.

18 SUPPLEMENTAL & AMENDED PLEA.

Anderson Tully Co.,
vs. No.
V. S. & P. Ry. Co. et al.

U. S. District Court, Southern District of Miss., sitting at Vicksburg.

The defendants Texarkana & Ft. Smith Ry. Co., V. S. & P. Ry. Co., and K. C. S. Ry. Co., adopting all of the allegations of the original plea in abatement and to the jurisdiction of this Court amends said original plea by answering that as a matter of law this Hon. Court is without jurisdiction to determine a personal controversy between citizens of other States and that as shown by the plaintiff's petition this is a personal litigation between citizens of the States of Michigan, Louisiana, Texas and Missouri.

Appearers therefore pray that the original and this supplemental plea be sustained and this suit dismissed.

J. C. THEUS,
S. W. MOORE,
Attys.

J. C. Theus sworn says that he is attorney for defts. and that the allegations of fact in above plea are true and that this plea is not filed for delay.

J. C. THEUS.

Sworn to and subscribed before me this Jany. 6th, 1918.

JACK THOMPSON, (Seal)
Clerk U. S. Court.
B. L. TODD, Jr.
D. C.

Indorsed: Filed Jan. 6, 1919.

19 STIPULATION.

In the U. S. Dist. Court, So. Dist. Miss.

Anderson Tully Co.,

v. 324

V. S. & P. Ry. Co. et als.

Stipulation.

In this matter it is stipulated by counsel that exactly the same arrangement is now in force between the V. S. & P. Ry. Co. and the A. & V. Ry. Co. as was in effect before the U. S. Government took control of these two roads; that a joint ticket office is maintained at which tickets are sold over the V. S. & P. Ry. Co. from Vicksburg to Shreveport, and the V. S. & P. Ry. Co. pays the A. & V. Ry. Co. as per relative mileage and pays the Transfer Co. which ferries the car from Vicksburg, Miss., to Delta Point, La., 50c. per passenger; that no division of passenger rate is shown by tariff filed with the Interstate Commerce Commission but the tariff is filed by the V. S. & P. Ry. Co. alone.

That the V. S. & P. Ry. Co. as initial carrier issues its bills of lading from Vicksburg, and has alone filed tariffs between Vicksburg and Shreveport; that by agreement it pays to the A. & V. Ry. Co. the mileage represented by the haul east of the Mississippi River and pays the Transfer Co. 5% of the freight on a car moving from Vicksburg to Shreveport.

That the V. S. & P. Ry. Co. pays a part of the expense of keeping up the ticket office and the freight office in Vicksburg, and sends its passenger cars over the river from Delta Point, to be handled for passenger traffic moving from Vicksburg to Shreveport, La. This latter stipulation applies to only one passenger train made up at Vicksburg and running to Shreveport and
20 return.

The V. S. & P. Ry. Co. is a Louisiana corporation with its domicile and principal offices and shops in Monroe, La., that its tracks are wholly in the State of Louisiana; that its engines remain on the Louisiana side of the Miss. River, and all trains going east are handled by A. & V. engines on the east side of said Miss. River until delivered to other connecting carriers and going west until delivered to Transfer Co.

R. G. BROWN,
For Pltf.

J. C. THEUS,
Of Counsel for Defts.

Indorsed: Filed Jan. 6, 1919.

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21 ANSWER.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson Tully Company, a Corporation, Complainant,

vs.

Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana and Fort Smith Railway Company, Defendants.

Answer of the Defendants.

Now comes the Vicksburg, Shreveport and Pacific Railway Company, herein referred to as the Vicksburg Company, the Kansas City Southern Railway Company, herein referred to as the Southern Company, and the Texarkana and Fort Smith Railway Company, herein referred to as the Texarkana Company, and specially reserving all rights under their pleas heretofore filed and overruled, for their joint and separate answer to the plaintiff's petition state and allege:

I.

The defendants deny that the petitioner is lawfully and rightfully entitled to receive from the defendants, or any of them, the sum of $6,756.04, with interest thereon from the 8th day of July, 1918, at the rate of six per cent per annum, or any other sum as its damage and reparation in connection with a report and order of the Interstate Commerce Commission dated July 8th, 1918, docket No. 5537, and the defendants allege that none of them is indebted to the complainant in any sum whatsoever as alleged in paragraph 1 of the plaintiffs petition or otherwise.

II.

The defendants admit the organization and citizenship of the plaintiff and of the defendants, as stated in paragraph 2 of the plaintiff's petition, and admit that the plaintiff at the times mentioned in its petition was engaged in the business of making, selling and shipping box shooks from its mill in the City of Vicksburg, State of Mississippi, to Port Arthur, in the State of Texas, and that said business involved large shipments of box shooks over the lines operated by the defendants from
22 Vicksburg to Port Arthur. The defendants admit that at all times mentioned in the plaintiff's petition they were and still are railroad corporations, and that on and at all times prior to December 27th, 1917, they were common carriers engaged in interstate railroad transportation of passengers and property between the points of Vicksburg, Mississippi, and Port Arthur, Texas, and aver that the line of the Vicksburg Company extended from Delta Point, Louisiana, to Shreveport, Louisiana; that the line of the Southern Company extended from Shreveport to Port Arthur, Texas, except such portions thereof as were in the State of Texas, which were operated by the Texarkana Company.

III.

The defendants admit that on February 14, 1914, the plaintiff filed a formal complaint with the Interstate Commerce Commission against these defendants and certain others hereinafter named, showing that the rate of freight which it had been charged from Vicksburg, Mississippi, to Port Arthur, Texas, was 20 cents per one hundred pounds, and alleging that said rate was unreasonable; but the defendants deny that it was therein alleged to be unreasonable "to the extent that it exceeds 16 cents, an aggregate of the contemporaneously applicable intermediate rates based on Delta Point, Louisiana," but aver that it was alleged in said petition that said rate of 20 cents per hundred pounds was unjust and unreasonable in and of itself, in violation of Section 1 of the Act to Regulate Commerce; that it subjected complainant to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Act to Regulate Commerce, and that said rate of 20 cents per hundred pounds was unreasonable to the extent that it exceeded 15 cents per hundred pounds from Vicksburg, Mississippi, to Port Arthur, Texas.

These defendants admit that said complaint was heard in Chicago, November 14th, 1913, and that the Interstate Commerce Commission found that reparation was due but no order was entered as the record was insufficient, but pray leave to refer to said order and the opinion of the Commission for a more specific statement of their contents. These defendants admit that a re-

23 hearing was granted and that the Interstate Commerce Commission in its opinion thereon substantially reaffirmed its former findings. Said opinion on rehearing is set out in 39 I. C. C. 734, to which defendants refer for a specific statement of its contents. Defendants admit that the plaintiff prepared a detailed statement of shipments upon which reparation is claimed, and that the defendants were unable to certify that the shipments consisted of box shooks, for the reason that

they were billed as "box material," on which the aggregate of intermediate rates was 18 cents, and that the case was thereupon assigned for further hearing for the purpose of determining the amount of reparation due. Defendants admit that further proof was taken upon this point and that the case was submitted on the 30th day of March, 1918, and that on the 8th day of July, 1918, an opinion was handed down by the Interstate Commerce Commission, reported in 50 I. C. C. 553, and an order was entered that the petitioner was entitled to reparation in the sum of $4,906.48, together with interest thereon at 6 per cent per annum from the 14th day of March, 1912, as reparation on account of an alleged unreasonable rate exacted by these defendants for the transportation of various car loads of box shooks from Vicksburg, Mississippi, to Port Arthur, Texas.

IV.

Defendants admit that said opinion and order require that the defendants shall pay the complainant on or before Sept. 16, 1918, the sum of $4,906.48 with interest thereon at six per cent. per annum from March 14, 1914, and that said order was duly served upon the defendants and demand made that the defendants pay the complainant the said sum, and that the defendants have wholly failed, neglected, and refused to pay the same.

V.

As their justification for their refusal to comply with the said order of reparation made by the Interstate Commerce Commission as above stated, the defendants state:

(a) In 1909 the plaintiff maintained and operated mills at Vicksburg, Mississippi, and Memphis,
24 Tennessee, for the manufacture of box shooks, which it desired to sell at or near Port Arthur,
Texas. At that time the rate applicable to carload ship-

ments of box shooks was 27 cents per hundred pounds from Memphis, and Vicksburg, to Port Arthur, and was also 27 cents from New Orleans to Port Arthur. In the same year, the rate on box shooks from New Orleans to Port Arthur, Texas, was reduced to 17 cents, and the plaintiff, feeling that this rate placed its mills at a disadvantage in marketing its product at Port Arthur applied to the defendant, the Southern Company, for a rate of 20 cents per hundred pounds, and, after some correspondence upon the subject, the defendant Southern Company and its co-defendants arranged to put in effect and did put in effect a rate of 20 cents per hundred pounds on box shooks from Vicksburg to Port Arthur. This, as above stated, was done at the plaintiff's request to enable it to market its product at Port Arthur and was satisfactory to it.

The arrangement between the plaintiff and the defendants for the said 20 cent rate was made early in 1910, but did not become effective until April 10, 1910. Prior to its effective date, to-wit, on April 2, and April 6, 1910, the plaintiff made shipments of box shooks in car loads over the lines of these defendants from Vicksburg to Port Arthur via. Shreveport, at the then lawfully published rate of 29 cents per hundred pounds, the rate having been raised from 27 cents to 29 cents. After the said 20 cent rate had become effective the plaintiff applied to the Vicksburg Company for reparation with respect to the said two cars of box shooks shipped on April 2nd, and April 6th, 1910, on which the 29 cent rate had been applied and paid, asking that the 20 cent rate be made applicable thereto and that the difference between the 29 cent rate and the 20 cent rate be refunded to plaintiff. The Vicksburg Company was willing to make the reparation if the Interstate Commerce Commission would order or permit it to be done, and accordingly a written application to the Interstate Commerce Commission in accordance with its practice was prepared by
25 the plaintiff and the Vicksburg Company setting forth the facts in reference to said two cars, a

copy of which application is hereto attached marked Exhibit "A." Thereupon the Interstate Commerce Commission by its order of record directed the payment to complainant by the defendants herein of the sum of $79.29 as reparation, and authorized these defendants to charge a rate not in excess of 20 cents per hundred pounds for not less than one year after July 5, 1911, on cottonwood box material, which includes box shooks, in car loads from Vicksburg to Port Arthur, Texas, as follows:

Ordered: that the above named defendants be, and they are hereby authorized and directed, on or before Feb. 28, 1912, to pay unto the complainant, Anderson-Tully Company, of Memphis, Tenn., the sum of $79.29 as reparation for the unreasonable rate charged for the aforesaid shipments.

And it is further ordered: that the defendants, The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, shall maintain and keep in force for a period of not less than one year from July 5, 1911, a rate on cottonwood box material, in car loads from Vicksburg, Miss., to Port Arthur, Texas, that shall not exceed 20 cents per 100 pounds, applicable to a minimum weight of 30,000 pounds.

A complete copy of said order is hereto attached, marked Exhibit "B."

The defendants plead the foregoing order of the Interstate Commerce Commission as establishing their lawful right to charge 20 cents per hundred pounds upon cotton wood box material, which includes box shooks, from Vicksburg, Miss, to Port Arthur, Texas, via Shreveport, during the period from July 5, 1911, to July 5, 1912, during which time a large proportion of the shipments were made by the plaintiff over the defendant railroads from Vicksburg to Port Arthur, in respect to which reparation has been awarded by the Commission as above set forth; and the defendants aver that said rate of 20 cents so estab-

lished as a reasonable rate continued to be a reasonable rate thereafter as to all said shipments with respect to which reparation has been awarded in the order sued upon herein.

(b) The petition of the plaintiff, filed before the Interstate Commerce Commission above referred
26 to, was not only against these defendants but against the Yazoo & Mississippi Valley Railway Company and the New Orleans, Texas & Mexico Railroad Company, and complained, as above stated, of the alleged unreasonableness of a 20 cent rate on box material or shooks from Vicksburg, Miss., to Port Arthur, Texas, over the lines of these defendants via Shreveport, and also over the lines of the Yazoo & Mississippi Valley Railway Company, New Orleans, Texas & Mexico Railroad Company, The Kansas City Southern Railway Company, and the Texarkana & Fort Smith Railway Company via Baton Rouge, Louisiana. The mileage from Vicksburg to Port Arthur via Baton Rouge is 354 miles and the mileage from Vicksburg to Port Arthur via Shreveport is 398 miles. The handling of shipments via Baton Rouge involves three railroads, The Southern Company, and the Texarkana Company being parts of the same system and counted as one, whereas the handling of shipments via Shreveport involves but two lines. For these and other reasons, the cost of transporting box shooks in carload lots from Vicksburg to Port Arthur at the time in question was no greater, and undoubtedly considerably less, via Baton Rouge than over the longer line of these defendants via Shreveport. The Interstate Commerce Commission found that the rate of 20 cents per hundred pounds on box material or shooks at the time in question was a reasonable car load rate over the route via Baton Rouge and dismissed the plaintiff's complaint as against the lines involved therein, and at the same time held that the same rate on the same commodity via Shreveport was unreasonably high and made this finding the basis of its order of reparation. These defendants charge and aver

that said findings of unreasonableness as to the 20 cent rate, when charged by these defendants, is invalid under the Law, unjustified by the facts, and discriminatory and unduly and unlawfully discriminatory against these defendants.

(c) The Interstate Commerce Commission found that the 20 cent rate over defendants' line was unreasonably high for the sole reason that there was in effect at the time a rate of 3 cents per 100 pounds on shooks
27 from Vicksburg to Delta Point, La., and a rate of 13 cents from Delta Point to Port Arthur. This is held by the Commission to make a prima facie case of unreasonableness of the 20 cent rate, which it is said the defendants failed to overcome. With respect to this matter the defendants charge and aver that the rate of 3 cents on shooks from Vicksburg to Delta Point, La., was a mere paper rate and not entitled to any weight or consideration whatsoever in testing the reasonableness of the through rate of 20 cents, and that the 13 cent rate from Delta Point to Port Arthur was a blanket rate applicable to Port Arthur, Texas, from all points on the line of the Vicksburg Company, 172 miles in length, and hence its reasonableness or unreasonableness could only have relation to the center of the density of traffic on the Vicksburg line and should not be taken as a criterion of reasonableness at the extreme eastern limit of the blanket at Delta point. Furthermore, as far as concerns its application from Delta Point, the 13 cent rate was also a paper rate and entitled to no consideration, for the reason that Delta Point, La., is an insignificant station of no commercial importance whatsoever, and there never has been, and in all probability never will be, shipped a carload of box material or shooks originating or having its destination at Delta Point. The 3 cent rate between Vicksburg and Delta Point was unknown to the plaintiff until its existence was developed at the taking of testimony before the Interstate Commerce Commission, and was unknown to the defendants, the South-

ern Company and the Texarkana Company, and had been forgotten or overlooked by the agents of the Vicksburg Company. It performed no function and served no purpose and should be disregarded. The 13 cent rate from Delta Point performed no function or service in shipments to which it could apply, and for this reason is entitled to no weight or consideration in determining the reasonableness of the 20 cent rate.

(d) In its opinions heretofore referred to herein The Interstate Commerce Commission found that subsequent to May 24, 1913, the date upon which the aforesaid rate of 13 cents from Delta Point to Port Arthur was increased by the defendants to 17 cents, thereby
28 making the aggregate of the intermediate rates from Vicksburg to Port Arthur equal to the through rate of 20 cents, said through rate of 20 cents was not unreasonable. Defendants aver that there were no changes in the circumstances and conditions attending the transportation of the commodity in question from Vicksburg to Port Arthur as between the time subsequent to May 24, 1913, and the time prior thereto covered by the said order of reparation, such as to justify a finding that a rate found to be reasonable during the later period was nevertheless excessive when applied to the earlier period.

(e) It is true, as stated by the Interstate Commerce Commission in its opinion delivered on May 4th, 1914, above referred to, that the rate situation affecting the movement of box material or shooks between Vicksburg and Port Arthur, via Shreveport during the period when the shipments in question moved, was covered by an application filed by these defendants under the Fourth Section of the Interstate Commerce Act as amended June 18, 1910. The effect of said application by the express terms of said Section 4, was that no change would be required to be made in said through rate of 20 cents between Vicksburg and Port Arthur via Shreveport, so long as said ap-

plication was pending. The result was that at all times herein said 20 cent rate was a proper and lawful rate and could not be said to be prime facie unreasonably high upon the sole ground that it exceeded the aggregate of intermediate rates. Furthermore the Interstate Commerce Commission in awarding reparation to the plaintiff, thereby in effect ruled that said 20 cent rate was unreasonably high by reason of the fact of the existence of a lower aggregate of intermediate rates which was not in issue by the pleadings or otherwise in plaintiff's proceeding, but was an issue which could only be heard and determined in the proceeding made by defendants' said application for relief under the Fourth Section. The action of the Interstate Commerce Commission in awarding reparation in the premises was not only in violation of the express provisions of said amended section 4, but amounted to a denial of due process of law to these defendants, in that it awarded reparation upon a cause of action not stated or alleged in the plaintiff's petition, and if said action of the Commission be affirmed by this Court, it will for the same reason amount to a denial to these defendants of due process of law in conflict with the Fourteenth Amendment to the Constitution of the United States.

29

Wherefore these defendants pray to be discharged with their costs.

S. W. MOORE,
J. C. THEUS,
Attorneys for Deft.

J. C. Theus being by me duly sworn says that he is attorney for defendants; that the officers authorized to make this affidavit are absent from the jurisdiction of this Court and that the allegations of fact in the foregoing answer are true to the best of his knowledge, information and belief.

J. C. THEUS.

Sworn to and subscribed before me this Jan. 6, 1918.
JACK THOMPSON,
Clerk U. S. Court. (Seal)

Indorsed: Filed Jan. 6, 1919.

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30 REPLICATION.

In the United States District Court, So. Dist. of Mississippi.

Anderson Tully Co.,
v.
V. S. & P. Ry. Co., et al.

Replication.

Comes the Plaintiff, by R. G. Brown, its Attorney, and denies the allegations made in the plea in abatement filed by the defendants and joins issue on same.
R. G. BROWN,
Attorney for Plaintiff.

Indorsed: Filed Jan. 6, 1919.

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31 JUDGMENT AGAINST DEFENDANTS.

In the District Court of the United States for the Southern District of Mississippi.

Anderson-Tully Company, Plaintiff,
vs. No. 324 Law.
The Vicksburg Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, The Texarkansas, Fort Smith Railway Company, Defendants.

This cause came on to be heard upon the merits after the Court had overruled the plea in abatement to the jurisdiction of the Court, filed by the defendants.

And thereupon in open Court it was stipulated and agreed by counsel that either party might use in evidence any part of the record and evidence introduced before the Interstate Commerce Commission upon any of the hearings had there, and might introduce in evidence any of the printed reports and findings of said Interstate Commerce Commission.

And thereupon the plaintiff to support this contention introduced in evidence the report of the Interstate Commerce Commission of date July 8, 1918, made Exhibit "A" to the complaint, and the order of the Commission, based upon said report, made Exhibit "B" to the petition.

Plaintiff then closed and the defendants introduced no evidence.

It is, therefore, by the Court found that the report and order of the Interstate Commerce Commission being prima facie evidence of all the facts stated therein, the award made by the Interstate Commerce Commission in favor of the Anderson-Tully Company should be allowed by this Court.

It is, therefore, ordered, adjudged and decreed that the Anderson-Tully Company have and recover of the Defendants, the Vicksburg, Shreveport & Pacific Railway Company, the Kansas City Southern Railway Company, and the Texarkansas, Fort Smith Railway Company the sum of $6,910.56, being the sum of $4,906.48, with
32 interest from the 14th day of March, 1912.

It is further ordered, adjudged and decreed that an attorney's fee of $691.05, being ten per cent (10%) of the amount of the recovery herein, is a reasonable attorney's fee to be recovered by the Anderson-Tully Company, for and on behalf of its counsel of record, Brown & Anderson.

It is further ordered that the plaintiff recover of the defendants all the costs of this cause.

E. R. HOLMES,
District Judge.

Indorsed: Filed and entered Jan. 7, 1919.

23 MOTION FOR A NEW TRIAL.

United States District Court, Western Division of Miss.

Anderson Tully Co,
v. No.
V. S. & P. Ry. Co. et al.

The defendants appear by counsel and show that the verdict and judgment of this Honorable Court is contrary to the law and the evidence, and hence prays that they be granted a new trial and for general relief.

J. C. THEUS,
Attorney.

Indorsed: Filed Jan. 7, 1919.

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24 ORDER OVERRULING MOTION FOR NEW TRIAL AND ALLOWING DEFENDANTS SIXTY DAYS IN WHICH TO PREPARE AND PRESENT BILL OF EXCEPTIONS.

The Anderson Tully Company,
vs. No. 324.
The V. S. & P. Ry. Company, et al.

The above entitled and numbered cause coming on to be heard, this day, on Motion of the Defendants to vacate the judgment entered herein and to award the defendants a new trial and the Court having heard and considered said motion, doth overrule said motion and to the action of the Court in so doing the defendants then and there in open Court excepted and still excepts, which exceptions are allowed by the Court and the defendants are given sixty days in which to prepare and present bill of exceptions and to perfect their record for appeal.

Ordered, adjudged and decreed this the 7th day of January, 1919.

E. R. HOLMES, Judge.

Indorsed: Filed Jan. 7, 1919.

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35 ORDER ALLOWING DEFENDANTS SIXTY DAYS FURTHER TIME IN WHICH TO PREPARE, FILE AND HAVE SIGNED THEIR BILL OF EXCEPTIONS, ETC.

United States District Court, Western Division of the Southern District of Mississippi.

Anderson-Tully Company, Plaintiff,

versus No.324

Vicksburg, Shreveport & Pacific Railway Company et al.

Vicksburg, Shreveport & Pacific Railway Company, et al., Defendants.

On application of the Defendants it is ordered and adjudged that the defendants be granted 60 days further time in which to prepare, file and have signed their bill of exceptions on the plea in abatement and on the plea to the jurisdiction of the Court, and also that the defendants be granted 60 days further time in which to file any amendments to any and all of said bills of exceptions.

Ordered, and adjudged this the 15th day of January, A. D. 1919.

EDWIN R. HOLMES,
U. S. District Judge.

Indorsed: Filed Jan. 16, 1919.

36 BILL OF EXCEPTIONS.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a Corporation,
vs.
The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company.

Bill of Exceptions.

Be it remembered that on the 6th day of January, 1919, at a stated term of the said Court begun and held at Vicksburg in and for the Western Division of the Southern District of Mississippi, before his Honor, Edwin R. Holmes, District Judge, the above entitled cause came on regularly to be heard, and the following proceedings were had, to-wit:

The plaintiff appeared by its counsel, R. G. Brown, Esq., and announced ready for trial. Defendants appeared specially by their counsel, J. C. Theus, Esq., for the purpose of submitting their original and supplemental pleas to the jurisdiction of this Court to proceed against the defendants herein, which said pleas were thereupon submitted to the Court, and were and are in words and figures as follows, to-wit:

Original and Supplemental Pleas omitted from the printed record, being heretofore copied at pages 16 and 18.

* * * * * * * * * * * * * * *

38 In support of said plea the following stipulation of the parties hereto, duly signed by their counsel respectively, was offered in evidence by the Defendants:

Stipulation omitted from the printed record, being heretofore copied at page 19.

* * * * * * * * * * *

39 **And also the published tariff of the V. S. & P. Ry. Co. was offered in evidence.**

This Court, upon consideration thereof, overruled defendants' said original and supplemental pleas to the jurisdiction of the Court to proceed against the defendants herein, to which ruling and action of the Court defendants then and there, in open Court, excepted and still except, and in this behalf tender their bill of exceptions.

Thereupon, on January 6th, 1919, defendants filed their verified answer in said cause, subject to their exception previously taken to the action of the Court in overruling their said pleas to the jurisdiction of the Court herein.

Thereupon this cause came on to be tried on its merits, whereupon the parties aforesaid, by their counsel, in accordance with the statute in such case made and provided, waived a trial by jury; and the trial of said cause proceeded on January 6th, 1919, before the Judge without the intervention of a jury.

The counsel for the plaintiff began reading to the Court his declaration and exhibits, which contained the award of the Interstate Commerce Commission, and after he began to read the award, thereupon the counsel for the defendant objected on the ground that the award was not certified to. Thereupon the Court remarked that counsel for the plaintiff was simply reading his pleadings. Whereupon counsel for the plaintiff said that the defendant admitted in his answer the award. The attorney for the defendant stated that he did not admit the award in his answer. Whereupon counsel for the plaintiff took the answer of the defendant and read therefrom an admission of the award, and counsel for the defendant stated that he did not know it was in the answer, as the answer had been prepared by his associate attorneys who were not present

at the trial. Counsel for the defendant then further objected to the admission of the award on the ground that it was incompetent to admit a part of the record without admitting the entire record of the Interstate Commerce Commission, and counsel for the plaintiff stated that he had no objection to the entire record going in; that if counsel for the defendant desired, the whole record might go in, and counsel for the defendant agreed for the whole record to go in. Counsel for the plaintiff then placed on the table what he said was a copy of the record of the Interstate Commerce Commission, and the Court understood that the entire record was to be "Considered in." The counsel for the plaintiff then stated that he rested on the award of the Interstate Commission, which was admitted in the answer. No part of said record, except the award, was read to the Court, or used by either side. Thereupon the matter was submitted to the Court, the defendant claiming that the award was discriminatory and unconstitutional, and the Court held that on the matter as submitted to it, it could not go behind the award, and the Court gave judgment for the plaintiff. Thereafter the defendant made a motion for a new trial, which motion was overruled by the Court, to which action of the Court in overruling this motion for a new trial, the defendant then and there accepted and reserved this his bill of exceptions, which is signed by this Court this the 8th day of March, A. D. 1919.

EDWIN R. HOLMES,
District Judge.

Indorsed:—Filed March 11, 1919.

41 INTERSTATE COMMERCE COMMISSION
RECORD AND AWARD.

Docket No. 5537. Filed Feb. 14, 1913.
Interstate Commerce Commission.

Anderson Tully Company
vs.
Alabama & Vicksburg Railway Company, Vicksburg, Shreveport & Pacific Railway Company, The Yazoo & Mississippi Valley Railroad Company, New Orleans, Texas & Mexico Railroad Company, The Kansas City Southern Railroad Company, Texarkana & Ft. Smith Railway Company.

The petition of the above named Complainant respectfully shows:

1. That said Complainant is a corporation organized and operating by virtue of the laws of the State of Michigan, with Home Office at Benton Harbor, Michigan, and principal place of business at Memphis, Tennessee.

That said complainant is engaged in the manufacture of Lumber and Box Material or Shooks, with mills at Memphis, Tennessee, and Vicksburg, Mississippi.

II. That the defendants above named are common carriers engaged in the transportation of passengers and property by railroad between Vicksburg, Mississippi, and Port Arthur, Texas, and as such common carriers are subject to the provisions of the Act to Regulate Commerce, Approved Feby. 4, 1887, and Acts amendatory thereof or supplementary thereto.

III. That the rate charged by these defendants for the transportation of Box Material or Shooks from Vicksburg, Mississippi, to Port Arthur, Texas, is twenty (20) cents per 100 pounds, as per Southwestern Lines tariff No. 63-F, F. A. Leland, Agent, I. C. C. No. 941.

That the said rate of twenty (20) cents per 100 pounds is unjust and unreasonable in and of itself in violation of Section One of the Act to Regulate Commerce; that it also subjects Complainant to undue and unreasonable prejudice and disadvantage in violation of Section Three of the Act to Regulate Commerce.

IV. That the rate of Box Material or Shooks from all stations in Louisiana on the Vicksburg, Shreveport & Pacific Railway, including stations on the west side of the Mississippi River opposite Vicksburg, Mississippi, to Port Arthur, Texas, is thirteen (13) cents per 100 pounds as per Southwestern Lines tariff No. 63-F, F. A. Leland, Agent, I. C. C. No. 941.

V. That in view of this rate, and for other reasons which the Complainant will show, a rate greater than fifteen (15) cents per 100 pounds from Vicksburg, Miss., to Port Arthur, Texas, is unjust, unreasonable and discriminatory.

Wherefore, this Complainant prays that defendants be required to answer the charges herein, and that after due hearing and investigation an order be made by this Honorable Commission commanding them to cease and desist from the aforesaid violation of the Act to Regulate Commerce in charging, demanding, collecting and receiving the aforesaid unjust, unreasonable and discriminatory rate of twenty (20) cents per 100 pounds from Vicksburg, Miss., to Port Arthur, Texas, and to establish and maintain for a period of two years a rate not to exceed fifteen (15) cents per 100 pounds; that Complainant be awarded reparation on all of the shipments which they have made from and to the point embraced in this complaint during the past two years, to be measured by the difference between the unjust and unlawful rate
42 of twenty (20) cents per 100 pounds, and such just and lawful rate as may be established by this Commission; and for such other and further orders as the Commission may deem necessary in the premises.

Dated at Memphis, Tennessee, this the 12th day of February, 1913.

ANDERSON TULLY COMPANY,
Per W. B. MORGAN, Secretary.

43 JOINT AND SEPARATE ANSWER OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA AND FORT SMITH RAILWAY COMPANY.

Before the Interstate Commerce Commission.

Anderson-Tully Company, Complainants,
vs. No. 5537.
Alabama and Vicksburg Railway Company, et al., Defendants.

Come now defendants, the Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company and for their joint and separate answer to the petition filed in the above entitled cause, respectfully state:

1. These defendants admit the allegations in paragraph 1 of said petition.

2. These defendants admit the allegations in paragraph 2 of said petition.

3. These defendants admit the allegations as to the rate per hundred pounds on box material or shooks from various parts to Port Arthur as alleged in paragraph 3, but deny each and every other allegation in said paragraph contained.

4. These defendants admit the allegations in paragraph 4 of said petition.

5. These defendants deny the allegations in paragraph 5 of said petition.

Wherefore these defendants pray that said petition be dismissed as to them.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
TEXARKANA & FORT SMITH RAILWAY COMPANY,
(Signed) JOHN G. SCHAICH,
Commerce Counsel.

John G. Schaich,
Commerce Counsel,
Thayer Building, K. C., Mo.

44 Interstate Commerce Commission.

Anderson Tully Company
vs. No. 5537.
Alabama & Vicksburg Railway Company, Et Al.

Submitted January 8, 1914. Decided May 4, 1914.

Reparation awarded on account of an unreasonable rate charged on certain carload shipments of box shooks from Vicksburg, Miss., to Port Arthur, Tex., which moved via the Vicksburg, Shreveport & Pacific Railway and connections. Rate via the Yazoo & Mississippi Valley Railroad and connections not found unreasonable.

H. B. Anderson for complainant.

S. W. Moore and J. M. Souby for Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

E. A. Smith and R. V. Fletcher for Yazoo & Mississippi Valley Railroad Company.

By the Commission:

Complainant is a corporation engaged in the manufacture of lumber and box shooks at Vicksburg, Miss. By complaint filed February 14, 1913, it alleges that an unreasonable rate was charged by defendants for the transportation of various carload shipments of box shooks from Vicksburg to Port Arthur, Texas, which moved within two years preceding that date. Reparation is asked.

Prior to 1910 the joint rate on lumber and other articles taking the same rate, including box shooks, from Vicksburg to Port Arthur, was 27 cents per 100 pounds. This was a blanket rate and applied from points as far north as Memphis, Tenn. Early in 1910, at the request of complainant, and owing to the fact that the rate on box shooks from New Orleans, La., to Port Arthur had been reduced from 23 to 17 cents, defendants established a rate of 20 cents on box shooks from Vicksburg to Port Arthur.

Under this rate complainant shipped during the period from February, 1911, until October, 1913, 398 carloads of box shooks. However, it appears that parties at Port Arthur to whom complainant has been shipping are now to a large extent manufacturing their own shooks from lumber which they draw from nearby points, and complainant's business has recently fallen off considerably. About 60 per cent of the shipments referred to moved via the Vicksburg, Shreveport & Pacific Railway to Shreveport, La., and via the Kansas City Southern Railway and the Texarkana & Ft. Smith Railway beyond, a haul of about 398 miles. The remainder of the shipments moved via the Yazoo & Mississippi Valley Railroad to Baton Rouge, La., and thence via the New Orleans, Texas and Mexico, the Kansas City Southern and the Texarkana & Ft. Smith Railways through De Quincy, La., to destination, a haul of about 354 miles.

The Vicksburg, Shreveport & Pacific Railway extends from Vicksburg to Shreveport. From all stations on this line in Louisiana, including Delta Point, which is the first station on the west side of the Mississippi River, the rate on lumber and box shooks to Port Arthur at the time the shipments moved was 13 cents. Delta Point is reached by ferry from Vicksburg. Complainant apparently assumes that 2 cents per 100 pounds would be reasonable for the transfer service from Vicksburg to Delta Point and contends that the rate from Vicksburg to Port Arthur should not exceed 15 cents.

Complainant not only regards this as a reason-
45 able rate for the route via the Vicksburg, Shreveport & Pacific, but also looks upon it as the proper measure of the rate to be applied via the Yazoo & Mississippi Valley and its connections.

The rate of the Vicksburg, Shreveport & Pacific on box shooks from Vicksburg to Delta Point was and is 3 cents. The sum of the intermediate rates in effect via that route from Vicksburg to Port Arthur at the time shipments moved was therefore 16 cents, or 4 cents less than the joint through rate. On May 14, 1913, subsequent to the filing of this complaint, the rate from Delta Point and the other stations on the Vicksburg, Shreveport & Pacific Railway in Louisiana was increased from 13 to 17 cents, and the [at] the present time the joint through rate is equal to the aggregate of the intermediate rates.

The situation as it existed before the increase and during the period when the shipments in question moved was covered by an application filed by defendants under the provisions of the fourth section of the Act. No hearing has been had thereon and defendants contend that no reparation can be awarded on the basis of the aggregate of the intermediate rates. However, we have consistently held that a joint rate which exceeds the aggregate of the intermediate rates is prima facie unreasonable; and that the burden is upon the carrier to defend the higher joint rate. The present rate, as above stated, conforms to the

requirements of the fourth section and defendants application in so far as this adjustment is concerned has no further office to perform.

Defendants' witness testified that the 13 cent rate formerly in effect from the stations on the Vicksburg, Shreveport & Pacific to Port Arthur was made to meet the competition of mills near Port Arthur from which very low rates apply, and that it was canceled because it was found that there had been no movement of lumber or shooks from those stations to Port Arthur. They contend that as it was merely a paper rate, it should not be used as a basis of or measure for the rate from Vicksburg.

Upon the facts of record we are of the opinion and find that the rate charged on the shipments which moved via the Vicksburg, Shreveport & Pacific Railway was unreasonable to the extent that it exceeded the sum of the intermediate rates based on Delta Point, amounting to 16 cents per 100 pounds.

With respect to the rate charged on the shipments which moved via the Yazoo & Mississippi Valley and its connections, and the rate now in effect via both routes, substantially the only evidence submitted was a comparison with rates applying from Vicksburg to points in other directions. In view of the varying circumstances and conditions which control the rates of this commodity in different territories, we cannot accept the rates cited in comparison as a standard by which to measure the rate in question, and upon the facts of record cannot find that it was or is unreasonable.

We find that complainant has been damaged on the shipments which moved via Delta Point, in an amount represented by the difference between the charges it paid and the charges which would have accrued at the rate herein found to have been reasonable, and that it is therefore entitled to an award of reparation. Upon this record, however, the amount of the reparation cannot be determined. Complainant will be expected to prepare a statement showing as to each shipment upon which reparation is claimed, the date of movement, points of origin and

destination, route, weight, car number and initials, charges collected and the amount of reparation due under our finding herein. This statement should be submitted with the freight bills covering the same to the defendants for verification. Upon receipt of statements, so prepared by complainant and certified to by defendants' proper accounting officers, the Commission will make such further order in respect to reparation as may seem proper.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

46 Interstate Commerce Commission.

No. 3537.

Anderson-Tully Company,
vs.
Alabama & Vicksburg Railway Company et al.

Submitted November 22, 1915. Decided May 19, 1916.

Former finding that the rate charged on certain carload shipments of box shooks from Vicksburg, Miss., to Port Arthur, Tex., which moved over the Vicksburg, Shreveport & Pacific Railway and connecting lines was unreasonable, but that the rate charged on shipments moving over the Yazoo & Mississippi Valley Railroad and connections was not shown to be unreasonable, affirmed on rehearing.

John R. Walker and H. B. Anderson for complainant.

J. M. Souby and S. W. Moore for Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

C. H. McKay and E. A. Smith for Yazoo & Mississippi Valley Railroad Company.

Report of the Commission on Rehearing.

By the Commission:

This case was originally decided May 4, 1914, unreported. The complaint, filed February 14, 1913, alleged that the rate of 20 cents per 100 pounds charged by defendants for the transportation of various carload shipments of box shooks from Vicksburg, Miss., to Port Arthur, Texas, which moved within two years preceding that date, was unreasonable. Reparation was asked. It developed that during the period from February, 1911, to October, 1913, complainant shipped 398 carloads of box shooks from Vicksburg to Port Arthur, of which about 60 per cent were moved by the Vicksburg, Shreveport & Pacific Railway through Delta Point, La., on the west bank of the Mississippi River opposite Vicksburg, to Shreveport, La., and by the Kansas City Southern and Texarkana & Fort Smith Railways thence to Port Arthur, a total distance of about 398 miles, the remaining shipments being moved by the Yazoo & Mississippi Valley Railroad to Baton Rouge, La., and by the New Orleans, Texas & Mexico Railroad and Kansas City Southern and Texarkana & Fort Smith Railways thence to destination, a total distance of about 354
47 miles. A joint rate of 20 cents per 100 pounds was applicable over both routes and was properly applied to all of the shipments. Prior to May 24, 1913, a rate of 3 cents per 100 pounds applied on box shooks, in car loads, from Vicksburg to Delta Point and a rate of 13 cents from Delta Point to Port Arthur, which rates aggregated 16 cents per 100 pounds. Effective May 24, 1913, following the filing of the complaint the rate from Delta Point to Port Arthur was increased to 17 cents, thereby increasing the aggregate of the rates to and from Delta Point to 20 cents. The previous discrepancy between the through rate and the aggregate of the rates to and from Delta Point was protected by an appropriate fourth section application. We found that the rate charge on the shipments which moved through Baton

Rouge was not shown to have been unreasonable but that the rate charged on the shipments which moved through Delta Point was unreasonable to the extent that it exceeded the aggregate of the intermediate rates to and from Delta Point, and that complainant was entitled to reparation on these shipments accordingly. The Kansas City Southern and the Texarkana & Fort Smith Railways subsequently filed a petition for rehearing alleging, among other things, that we erred in awarding reparation on the shipments moved through Delta Point because of the protective fourth section application mentioned; because the joint through rate was shown conclusively to be reasonable; and because the rate on box shooks from Vicksburg to Delta Point was 5 cents per 100 pounds and not 3 cents. An order was entered reopening the case on October 13, 1914. Rehearing has since been had, and the case is now before us on the whole record.

It appears that during the period of movement the Vicksburg, Shreveport & Pacific Railway maintained a rate of 5 cents per 100 pounds from Vicksburg to Delta Point on "Lumber; Box material, minimum weight 30,000 pounds, carloads"; and a rate of 3 cents per 100 pounds on "Lumber, logs, lath, shingles, staves, shooks and headings * * * * minimum weight 30,000 pounds * * * *". Defendants insist that the word "shooks" appearing in the second item quoted was a typographical error, and should have been "hoops". This may be true, but the rate on box shooks from Vicksburg to Delta Point was 3 cents per 100 pounds, and not 5 cents as defendants contend.

48 Most of the testimony offered by defendants on rehearing was cumulative. The defendants who filed the petition for rehearing stated that their aim was to have the case reconsidered on the evidence adduced at the first hearing rather than to have an opportunity to offer additional testimony. They showed that there is no movement of box shooks from Vicksburg to Delta Point and also introduced an exhibit contrast-

ing the 20 cent rate assailed with rates on lumber and staves ranging from 7.5 cents per 100 pounds to 23.67 cents for distances ranging from 116 miles to 615 miles between certain points in the south, but without evidence that the conditions were substantially the same. Complainant shows on the other hand that a rate of 15 cents per 100 pounds applied on box shooks from Delta Point to Port Arthur over the Vicksburg, Shreveport & Pacific to Shreveport and the lines of the Southern Pacific beyond, and that this rate is still in effect; that the earnings per car mile on the shipments involved under the rate sought, over either route, of movement, would have exceeded the average earnings per car mile of certain of the defendants of all traffic over their respective lines during 1914. Numerous rates on lumber and like traffic are cited also between various points in the same and other territories, but like the rates cited by defendants, without evidence of substantial similarity in transportation conditions. Indeed, the rates cited by complainant were made and are maintained under substantially dissimilar circumstances and conditions.

The Kansas City Southern and the Texarkana & Fort Smith cite Humphreys-Godwin Co. vs. Y. & M. V. R. R. Co., 31 I. C. C., 23 and cases there cited, in which we found that published through rates in excess of combinations of intermediate rates were not unreasonable. This is not such a case.

We find upon all of the facts now before us, that our previous findings were not erroneous and they are, therefore, affirmed.

Harlan and Daniels, Commissioners, dissent.

By the Commission.

(Seal)

GEORGE B. McGINTY,
Secretary.

39 I C C

49 Report of Interstate Commission on Rehearing, omitted from printed record, being heretofore copied at page 7.

* * * * * * * *

51 Order of Interstate Commerce Commission, July 8, 1918, omitted from printed record, being heretofore copied at page 9.

* * * * * * * * * * *

52 This was all of the testimony offered on behalf of plaintiff.

The defendants to sustain the issues on their part, offered in evidence the exhibits attached to their answer, as follows, to-wit:

53 I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is phostostat copy of Special Docket Application No. 17233, filed July 3, 1911, by the Vicksburg, Shreveport and Pacific Railway Company, Kansas City Southern Railway Company and the Texarkana and Fort Smith Railway Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 13th day of January, A. D. 1919.

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Jul-5-1911, 465150.

54 Before the
Interstate Commerce Commission.
Special Docket No. .....

Anderson Tully Company, Complainant,
vs.
Vicksburg, Shreveport & Pacific Railway, Kansas City Southern Railway, Texarkana & Fort Smith Railway, Defendants.

Complainant's No. .....
V. S. & P. Ry. Co. Claim No. E-60788.
.....Co. Claim No. .....
.....Co. Claim No. .....
.....Co. Claim No. .....

Request for Authority to Refund $79.29.

To the Interstate Commerce Commission:

The Vicksburg, Shreveport & Pacific Railway et al Company respectfully requests an order herein authorizing the payment to the above named claimant, of Memphis, State of Tennessee of the sum of Seventy-nine and 29/100 Dollars ($79.29), as special reparation in connection with the following shipments

Commodity Cottonwood Box Material

Number of shipments or car loads—Two—aggregate weight 88100
From Vicksburg, Mississippi to Port Arthur, Tex.
(Point of Origin) (Destination)

Consignor—Anderson Tully Company, consignee The Texas Company,

Bill of lading issued by VS&P Ry. Co., at Vicksburg, Miss.
(Use Initials)

Date 4/2 and 4/6, 1910, Shipments moved as follows:

VS&P Ry. Co., from Vicksburg, Miss., to Shreveport, La., direct.
(Use initials)

KCS Ry. & T&FtS Ry. Co., from Shreveport, La., to Port Arthur, Tex., direct.
.....Co., from ..... to .....via.

Aggregate freight charges actually collected, $255.49, date paid 5/16 and 12/6, 1910.

By whom paid $237.87 by consignee and $17.62 by consignor.
(consignee or consignor)

If through rate lawfully applicable use these spaces. Rate lawfully applicable 29c. per 100 pounds car load min. 30000 lbs. Tariff Authority S W L 2, I C C No. 678, page 120 effective 3/7/10
Item 189)

(a) Issued by F. A. Leland, Agt.

55 (If local rates applicable use these spaces).

Local from	To	Rate	C. L. Min.	Name of Tariff	ICC No.	Page	Date effect
.....							
.....							
.....							
.....							

Rate sought carload 30000
to be applied 20c. per 100 lbs. min lbs. for ..... ft. car.
Tariff authority S W L 63-A I. C. C. No. 696, page 204 effective 4/10/10.
(Item 696)

(a) Issued by F. A. Leland, Agent.

Aggregate freight charges at claimed rate would be $176.20.

Explanation and comments.

(Here may follow such general explanation or comments as the case may require. In case shipment was reconsigned, state date of reconsigning order, point of reconsignment and tariff authority for reconsignment. In case shipment was misrouted by initial carrier, state routing instructions given by consignor, if any, and the proper route in detail, with specific admission that misrouting was the result of error of carriers' agent, if such was the case).

At the time these two shipments moved, the interested lines had under way the question of publishing the rate sought to be applied of 20 cents per 100 pounds, which was necessary to meet competitive conditions between markets of production and the aforementioned rate was published in Item 696, page 204 of Southwestern Lines Tariff 63-A, ICC 696, issued by F. A. Leland, as Agent, effective April 10th, 1910, or several days after the shipments covered by this claim moved.

56 Exhibit 1 attached is a Statement of Billing in the standard form, and corresponds to the checked billing of the auditing department.

It is admitted that the rate lawfully applicable at the time and over the route shipment moved was, under all the circumstances and conditions then existing, excessive and unreasonable.

It is agreed that the order of the Commission authorizing refund herein may require that the published tariff rates and rules upon which adjustment is based shall be maintained (as maxima) for a period of one year from the date this application is filed.

The undersigned who makes this application in the name of his Company certifies that he has familiarized himself with all the facts and figures upon which this application for reparation is made and knows the same to be correct.

Respectfully submitted,
VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, Defendant.
By J. B. BANNON,
(Personal signature)
Its. Gen. Frt. Agent.

New Orleans, Louisiana.
Dec. 25th, 1910.

The undersigned companies join in the foregoing application:

KANSAS CITY SOUTHERN RAILWAY COMPANY,
By R. R. KITCHELL, (defendant)
(Personal Signature)
Its Gen. Frt. Agt.

TEXARKANA & FORT SMITH RAILWAY COMPANY, Defendant.
By G. B. WOODS,
(Personal Signature)
Its Gen. Frt. Agent.

The foregoing application must be personally signed by an executive or general officer of the accounting or traffic department and not by a subordinate.

I, H. H. LeRoy, have carefully read the foregoing application and certify that the facts as therein set forth have been verified by a check against the account affected as audited under my direction, and I now certify that the records of this company show:

1. That the aggregate weight was 88100 pounds.

2. That the aggregate freight charge actually collected and retained was $255.49.

57 3. That the amount of the refund to which the above named complainant are entitled, on the basis of the reduced rate, is $79.29, and that the present rate is 29c. per cwt.

4. The attached Statement of billing, Exhibit 1, corresponds to the checked billing of the auditing department.

H. H. LEROY.
(Personal Signature)
Assistant Comptroller.

This certificate must be personally signed by the comptroller or the accounting officer in charge of freight revenue account and not by a subordinate.

The foregoing certificate by the accounting officer of the applicant carrier must be used in every case and must show the aggregate charges on the shipments. But if the charges, or part of the charges, were collected by another carrier or carriers the following certificates will also be used, and in that event the above certificate, so far as the charges collected are concerned, will be understood to be based on and qualified by the assumed correctness of the following certificates.

58 If the applicant carrier did not collect the freight charges, the carrier which made the collection will use the following supplemental certificate; and if a third carrier collected part of the charges, the special certificate will also be used, and the supplemental certificate will be understood to be based on and qualified by the assumed correctness of the special certificate.

Supplemental Certificate.

I, ..., the ..... of the .... Rail.. Company, have carefully read the foregoing application and now certify that the records and accounts of this company, as audited under my direction, show:

1. That the aggregate weight was pounds.

2. That the aggregate freight charge, actually collected and retained was .....

3. That the attached statement of billing, Exhibit 1, corresponds to the checked billing of the auditing department of this company.

.....
Comptroller or General Auditor.

This certificate must be personally signed by the comptroller or accounting officer in charge of freight revenue accounts, not by a subordinate.

When a carrier other than the applicant and not the carrier using the Supplemental Certificate, has collected any part of the charges, the following Special Certificate will also be used.

Special Certificate.

I, F. P. Hall, the Auditor of the Texarkana & Fort Smith Railway Company have carefully read the foregoing application and now certify that the records and accounts of this company, as audited under my direction, show:

1. That the aggregate weight was 88100 pounds.

2. That additional freight charges were collected by this company to the amount of $237.87, no part of which has been refunded.

E. B. HALL, Auditor.

This certificate must be personally signed by the comptroller or accounting officer in charge of the freight revenue accounts, not by a subordinate.

59 Instructions—Read Carefully.

1. The Commission will not ordinarily take favorable action on an application for special reparation authority where the case is not presented to it within six months after the shipment moved, unless the rate on which the adjustment is sought was actually established within six months after the date of the movement.

2. Under Section 16 of the Act to Regulate Commerce, as interpreted by the Commission, all claims for reparation are absolutely barred if not filed within two years from the time the cause of action accrues.

3. This application should be accompanied by the original paid freight bills, which will be returned by the commission after the claim has been acted upon.

4. If the rate on which this application is based has been involved in a case previously acted upon or presented to the Commission, it is important that the fact be noted in the space for remarks in order to avoid duplication of the one year order.

5. The Commission will authorize payment only to the consignor or consignee, and not in favor of an assignee. In cases where the application is in favor of the person shown on the attached shipping papers to have directly paid the freight charges, such order as may be entered will read in favor of that person; but where the application is for authority to refund to the consignee when the papers show that the charges were paid by the consignor, or vice versa, the Commission requires that a stipulation be filed with the application signed by the consignor, by the consignee and by an executive or general officer of the carrier in substantially the following form:

Title (Here insert names of complainant and defendants as in application to which stipulation relates).

The undersigned ..... consignor of the following described shipment (here insert date, car number, commodity, and points of origin and destination) and .... the consignee thereof, and the undersigned ..... Rail.... Company, stipulate and agree that any order entered in the above entitled informal complaint for a refund on account of the excessive freight charges collected on said shipments shall be in favor of (here insert name of consignor or consignee, as the case may be.

(Signature of Consignor)
(Signature of Consignee)

60 Before the
Interstate Commerce Commission
Jul. 5, 1911 465150

Anderson Tully Company, complainant,
vs.
Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway and Texarkana & Ft. Smith Railway Company, Defendants.
Request for authority to refund $79.29.

To the Interstate Commerce Commission:

The undersigned, Anderson-Tully Company, the consignor of the following described shipments:

Dates ..... April 2nd and April 6th 1910.
Car Numbers ..... Southern Ry 40064 and RIA&L 30891.
Commodity ..... Cottonwood Box material.
Point of origin ..... Vicksburg, Mississippi.
Point of Destination ..... Port Arthur, Texas.

and the Texas Company, the consignee thereof, and the undersigned Vicksburg Shreveport & Pacific Railway Company, stipulate and agree that any order entered in the above entitled informal complaint for a refund on

account of the excessive freight charges collected on said shipments shall be in favor of Anderson-Tully Company.

ANDERSON-TULLY COMPANY,
S. B. ANDERSON,
Signature of Consignor.
THE TEXAS COMPANY,
Per R. G. DAWSON.
Signature of consignee.
VICKSBURG SHREVEPORT & PACIFIC RAILWAY COMPANY,
By J. B. BANNON,
Its Gen. Frt. Agent.

Claim No. 31022
T & F S Ry Co

61

EXHIBIT 1.

Form 3604.
Statement of Billing.

Jul 5-1911 463150
V. S & P. R. R. Co. Claim No. 31022 T & F S
From Vicksburg, Mississippi to Port Arthur, Texas.
Consignor Anderson Tully Company.
Consignee The Texas Company.

Date	W. B. No.	Car Initial No.	Articles	Weight	Rate	Freight Advances	Prepaid	Destination.
1910.		S						
4/8	26	30871	RIG&L					Cottonwood
			Box Material	36600	29	106.14		
				72800				
				36200				
				36600				
			(80)					Vicksburg G N C 45 12/2
								L N 12.15

Weights checked
L. 30724
Vix Agent given a miscellaneous.
Debit $7.32 & Cr Frt. Rev.
Febry. 1911
R-Loc-4066

62 EXHIBIT 1.

Form 3604.
Statement of Billing.

Jul. 5, 1911 465150

V. S. & P. R. R. Claim No. 31022 T. & F. S.
From Vicksburg, Miss., to Port Arthur, Texas.
Consignor Anderson Tully Company.
Consignee The Texas Co.

Date W. B. No. Car No. Initials. Articles. Weight. Rate Freight. Advances. Prepaid. Destination.

1910.

4/8 8
27 40960 Scu. Cottonwood
Box Material 51500 27 $139.05

Weights Checked

L. 30724.

Viz Agent given a miscellaneous
Debit $10.39 and Cr. Frt. Rev.
Feby. 1911.
R. Loc. 4066.

63 ORDER.

At a General Session of the Interstate Commerce Commission, held at its offices in Washington, D. C., on the ....day of Jan. 29, A. D. 191

Present:
Judson C. Clements
Charles A. Prouty
Franklin K. Lane
Edgar E. Clark Commissioners.
James S. Harlan
Charles C. McChord
Balthasar H. Meyer.

Special Docket No. 17233.

Anderson-Tully Company,
vs. Authority to refund $79.29
Vicksburg Shreveport & Pacific Railway Company; Kansas City Southern Railway Company; Texarkana & Fort Smith Railway Company.

An application having been filed to submit this case for hearing and determination on facts set forth in the pleadings and record, the Commission after consideration of all of the facts finds that under dates of April 2nd and 6th, 1910, the complainants forwarded over the lines of the defendants two carloads of cottonwood box material, weighing 88100 pounds, from Vicksburg, Miss., consigned to the Texas Company at Port Arthur, Texas; that the defendants applied their lawfully established rate of 29 cents per 100 pounds, minimum 30,000 pounds, and collected a total sum of $255.49; that subsequent to the movement or effective the 10th day of April, 1910, the defendants established a rate of 20 cents per 100 pounds, minimum 30,000 pounds, applicable to the traffic in question between the points named; that the rate charged was unreasonable to the extent it exceeded 20 cents per 100 pounds, the rate subsequently established; and that complainant is entitled to reparation in the sum of $79.29;

64 It is therefore

Ordered, that the above named defendants be, and they are hereby, authorized and directed, on or before February 28th, 1912 to pay unto complainant, Anderson-Tully Company, of Memphis, Tenn., the sum of $79.29 as reparation for the unreasonable rate charged for the aforesaid shipments.

And it is further ordered: That the defendants, the Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company, and Texarkana &

Fort Smith Railway Company, shall maintain and keep in force for a period of not less than one year from July 5, 1911, a rate on cottonwood box material, in carloads, from Vicksburg, Miss., to Port Arthur, Texas, that shall not exceed 20 cents per hundred pounds, applicable to a minimum weight of 30000 pounds.

By the Commission.

C. A. PROUTY, Chairman.

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65 PETITION FOR WRIT OF ERROR.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a corporation,

vs.

The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

Now come the above named defendants, plaintiffs in error, by their attorneys, and respectfully show that on the 6th day of January, 1919, this Court entered a judgment herein against said defendants and in favor of the plaintiff, and that thereafter a motion for a new trial was presented within the time allowed by the Court, asking the Court to set aside the judgment and grant defendants a new trial herein, which motion was by the Court on the 7th day of January, 1919, overruled, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these petitioners, the defendants in said cause, all of which will more in detail appear from the assignment of errors which is filed with this petition, and to which reference is made for a specific setting out of each assignment of error.

Wherefore, your petitioners pray that a writ of error do issue in their behalf for the correction of the errors

complained of and herewith assigned, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United
65-a States Circuit Court of Appeals for the Fifth Circuit, in order that said judgment so rendered may be reversed and such other and further proceedings had herein as may be proper.

S. W. MOORE,
J. C. THEUS,
J. M. SOUBY,
Attorneys for Plaintiffs in Error.

65-b ORDER GRANTING WRIT OF ERROR.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a corporation,
vs.
The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

Order Granting Writ of Error.

On this 8th day of March, 1919, this matter being presented upon the petition of the defendants for a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, for the correction of errors in the judgment entered against them in this cause on the 6th day of January, 1919, and the judgment thereafter entered on the 7th day of January, 1919, overruling their motion for a new trial, under and in accordance with the laws of the United States in that behalf made and provided, upon due consideration it is here and now ordered that said petition of the defendants be, and the same is

hereby granted, and that the writ of error prayed for be, and the same is hereby allowed, to review in the United States Circuit Court of Appeals for the Fifth Circuit the judgment so rendered and entered against the defendants in said cause; and the penal sum for the cost bond on such writ of error is fixed at Five Hundred ($500.00) Dollars, the surety or sureties on such bond to be approved by the clerk of this Court.

Made this 8th day of March, 1919.

EDWIN R. HOLMES,
Judge of the United States District Court for the Southern District of Mississippi.

Indorsed:—Filed March 11, 1919.

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66 ASSIGNMENT OF ERRORS.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a corporation,

vs.

The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

Now come Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, plaintiffs in error in the above entitled cause, and in connection with their petition for a writ of error in this cause assign the following errors which plaintiffs in error aver occurred upon the trial hereof, and upon which they rely to reverse the judgment entered herein as appears of record:

I.

The Court erred in overruling defendants' pleas to the jurisdiction.

II.

The Court erred in requiring defendants to proceed immediately to the trial of this case, after overruling their said pleas to the jurisdiction, and in refusing to allow them a reasonable time within which to secure the necessary documentary evidence and to procure the attendance of necessary witnesses.

66-a

III.

Plaintiff's petition herein does not state facts sufficient to constitute a cause of action against the defendants or any of them.

IV.

The Court erred in refusing to give the declaration of law requested by defendants at the conclusion of the testimony and before the submission of the cause to the Court that upon all the evidence plaintiff was not entitled to recover against any or all of the defendants.

V.

The Court erred in refusing to give the declaration of law requested by defendants at the conclusion of the testimony and before the submission of the cause to the Court, that there was not sufficient evidence before the Interstate Commerce Commission to sustain its order of reparation which forms the basis of plaintiff's action herein.

VI.

The Court erred in declaring the law to be that it could not inquire into or rule upon the question of the suffi-

ciency of the evidence before the Interstate Commerce Commission to support its order of reparation sued upon herein, which evidence formed a part of that offered by plaintiff in this case.

VII.

The Court erred in rendering judgment for plaintiff upon the agreed and conceded facts in this case, which were wholly insufficient to support a judgment for plaintiff.

66-b

VIII.

The Court erred in overruling defendants' motion for a new trial.

Wherefore, plaintiffs in error pray that the judgment herein be reversed and rendered in its favor or that the judgment be reversed and such direction be given as will insure to defendants the full force and efficacy of the rights to which they are entitled by reason of the facts in the case, the law applicable thereto and the defenses it has urged.

S. W. MOORE,
J. C. THEUS,
J. M. SOUBY,
Attorneys for Plaintiffs in Error.

67 WRIT OF ERROR.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a corporation,
vs.
The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

Writ of Error.

United States of America, Set.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the Western Division of the Southern District of Mississippi, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the January Term, 1919, thereof, between The Anderson-Tully Company, a corporation, plaintiff, and the Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, defendants, a manifest error hath happened, to the great damage of the said Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Fifth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of New Orleans, Louisiana, and filed in the office of the Clerk

of the United States Circuit Court of Appeals for the Fifth Circuit, within thirty (30) days from the date hereof, to the end that the record and proceedings afore-
67-a said being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court. Issued at office in Vicksburg this 8th day of March, in the year of our Lord one thousand nine hundred nineteen.

JACK THOMPSON, (Seal)
Clerk.
By J. H. SHORT, D. C.

Allowed by

EDWIN R. HOLMES, District Judge.

68 United States of America.

Western Division of the Southern District of Mississippi, Set.

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said District Court of the United States for the Western Division of the Southern District of Mississippi.

Issued at office in Vicksburg, this 11th day of March, A. D. 1919.

JACK THOMPSON, Clerk.
(Seal) By J. H. SHORT, D. C.

Indorsed:—Filed March 11, 1919.

69 CITATION AND WAIVER OF SERVICE.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a corporation,

vs.

The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company.

Citation.

United States of America, Set.

To the Anderson-Tully Company, a corporation and R. G. Brown, its attorney of record, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western Division of the Southern District of Mississippi, wherein Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Edwin R. Holmes, Judge of the District Court of the United States for the Western Division of the Southern District of Mississippi, this 8th day of March in the year of our Lord one thousand nine hundred nineteen.

EDWIN R. HOLMES, Judge.

70 Due service of the foregoing citation hereby acknowledged and further notice waived this 8th day of March, 1919.

(Signed) R. G. BROWN,
Attorney for Defendant in Error.

Indorsed:—Filed March 11, 1919.

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71 BOND.

In the District Court of the United States for the Southern District of Mississippi, Sitting at Vicksburg.

The Anderson-Tully Company, a corporation,
vs.
The Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company.

Bond on Writ of Error.

Know all men by these presents: That we, Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, as principals, and United States Fidelity & Guaranty Company, Baltimore, Md., as surety, are held and firmly bound unto the Anderson-Tully Company, in the full sum of Five Hundred Dollars, to be paid to the said Anderson-Tully Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of March, 1919.

Whereas, lately at the general term of the District Court of the United States for the Western Division of the Southern District of Mississippi, in a suit pending in said Court between The Anderson-Tully Company, plaintiff, and The Vicksburg, Shreveport & Pacific Rail-

way Company, the Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, defendants, judgment was rendered against the said named defendants, and the said defendants have obtained a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty (30) days from and after the date of said citation;

Now, therefore, the condition of the above obligation is such that if the said Vicksburg, Shreveport &
72 Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company shall prosecute said writ of error to effect and answer all costs, if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and effect.

THE VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY,
By J. C. THEUS, Its Attorney.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By J. C. THEUS, Its Attorney.
TEXARKANA & FORT SMITH RAILWAY COMPANY,
By J. C. THEUS, Its Attorney.

Approved this 11th day of March, 1919.

JACK THOMPSON, District Clerk.
J. H. SHORT, D. C.
UNITED STATES FIDELITY & GUARANTY COMPANY,
J. E. BUCK, Its Attorney in Fact.
UNITED STATES FIDELITY & GUARANTY COMPANY,
R. C. WILKERSON, Its Attorney in Fact.

Indorsed:—Filed March 11, 1919.

73 PRAECIPE.

In the District Court of the United States for the Southern District of Mississippi.

Anderson Tully Company, Plaintiff,
vs. No. .....
Vicksburg, Shreveport & Pacific Railway Company, et als, Defendants.

The clerk in the above styled and numbered cause will include in the transcript the following documents:

1. Petition or declaration of the Plaintiff.

2. Subpoena and return to V. S. & P. Ry. Co.

3. Subpoena and return to K. C. S. Ry. Co.

4. Subpoena and return to Texarkana & Ft. Smith Ry. Co.

5. Plea in abatement on the part of the V. S. & P. and K. C. S. Ry. Co.

6. Supplemental and amended plea in abatement to the jurisdiction on the part of the defendants.

7. Statement of facts on which plea and supplemental plea were submitted.

8. Decree over-ruling original and supplementai pleas.

9. Answer of Defendants.

10. Motion for New Trial.

11. Judgment or decree overruling motion for new trial.

12. Judgment or decree in favor of plaintiff.

13. Order granting ten days within which to submit bill of exception on judgment overruling plea in abatement and to the jurisdiction.

14. Order granting 60 days from date of judgment within which to present bills of exception and apply for writ of error.

15. Order granting 60 days from January 15th within which to present bills of exception and assignment of error.

16. Bill of exception.

17. Assignment of error.

18. Petition of Anderson Tully Company to Interstate Commerce Commission, Docket No. 5737, filed Feb. 14, 1913.

19. Answer of Kansas City Southern Ry. Co. and Texarkana & Ft. Smith Ry. Co., in same cause.

20. Unreported opinion No. A-643 of Interstate Commerce Commission which was submitted January 8, 1914, and decided May 4, 1914.

21. Report of Interstate Commerce Commission on rehearing in same cause, which was submitted Nov. 22, 1915, and decided May 19, 1916.

22. Reparation and award of Interstate Commerce Commission in same case decided July 8, 1918.

23. Photostat copy of Special Docket Application No. 17233 filed July 3, 1911, by the Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Ry. Co. and Texarkana & Ft. Smith Ry. Co., with certificate of Secretary of Interstate Commerce Commission.

24. Order of Interstate Commerce Commission in same case of Anderson Tully Company vs. V. S. & P. Ry. Co., et als., dated Jan. 29, 1918, Special Docket No. 17233.

25. Petition for writ of error.

26. Order granting writ of error.

27. Writ of error.

28. Citation with acknowledgement and waiver.

74 29. Bond.

Very truly,

J. C. THEUS,
Attorney for Plaintiff
in Error.

Indorsed:—Filed March 26, 1919.

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75 CLERK'S CERTIFICATE.

I, JACK THOMPSON, Clerk of the District Court of the United States, in the Fifth Circuit and Western Division of the Southern District of Mississippi, do hereby certify that the above and foregoing is a full, true and correct transcript of the record and all of the proceedings had in cause Number 324, wherein The Anderson-Tully Company, is Plaintiff and Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, are defendants, as fully as the same remains on file and of record in my office at Vicksburg Mississippi.

Witness my official signature and the seal of said Court at Vicksburg, in said Division of said District, on this 7th day of April, 1919.

JACK THOMPSON, Clerk.
(Seal) J. H. SHORT, Deputy Clerk.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Motion of Defendant in Error to Strike from Record.

Filed October 24, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

V., S. & P. R. R. Co. et als., Plaintiffs in Error,

vs.

THE ANDERSON-TULLY COMPANY, Defendants in Error.

Comes the defendant in error, the Anderson-Tully Company, by its counsel, R. G. Brown, Esq., and moves the Court to strike from the record pages 37 to the first paragraph on page 60, inclusive, and for grounds of such motion shows:

I. That it appears from the judgment recited in said record on page 37 thereof that it was stipulated and agreed by counsel in open Court that either party might use in evidence any part of the record and evidence introduced before the Interstate Commerce Commission upon any of the hearings had there, and might introduce in evidence any of the printed reports and findings of said Interstate Commerce Commission. That thereupon the plaintiff to support its contention, introduced in evidence the report of the Interstate Commerce Commission of date July 8, 1918, marked Exhibit A to the bill, and the order of the Commission based upon said report and made Exhibit B to the petition; that the plaintiff then closed, and the defendants introduced no evidence.

II. That it further appears from the bill of exceptions that at the hearing counsel for the plaintiff stated that he had the whole record with him, and that any part of the record might be introduced in evidence by either party; that counsel for the plaintiff then stated that he rested on the award of the Interstate Commerce Commission, which was admitted in the answer, and that no portion of said record was read to the Court or used by either side, except said award. (Record, page 36.)

III. That it appears that since the rendition of said judgment and the signing of the bill of exceptions, certain portions of the record before the Interstate Commerce Commission, which were not introduced in the Court below, nor considered by the Court, have, in some manner, been injected into the record and appear in the record on pages 37 to 60, including the first paragraph on page sixty.

IV. That it appears from the record that these excerpts from the proceedings before the Interstate Commerce Commission do not com-

prise the entire record, and that even if the appellants should be entitled to file the entire record before the Interstate Commerce Commission, they are not entitled to select certain parts thereof and introduce them for the first time in the appellate Court.

Wherefore, counsel for appellees moves the Court to strike from the record all of that portion thereof appearing on pages 37 to 60, first paragraph, inclusive.

(Signed) R. G. BROWN,
Atty. for Appellee.

Motion of Defendant in Error for Judgment on Account of Incomplete Record.

Filed October 24, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

V., S. & P. R. R. Co. et als., Plaintiffs in Error,

vs.

THE ANDERSON-TULLY COMPANY, Defendant in Error.

Now comes the appellee, the Anderson-Tully Company, and moves the Court to dismiss the appeal herein and to affirm the judgment of the District Court, and for grounds of said motion shows:

That it appears from the recitals in the bill of exceptions that there was introduced in evidence in the District Court the published tariff of the V. S. & P. Railway Company (Record, page 35) and the record nowhere shows said published tariffs.

Wherefore, the appellee shows to the Court that the record filed by the appellants is incomplete and imperfect, and that the appeal should therefore be dismissed and the judgment of the District Court affirmed.

(Signed) R. G. BROWN,
Attorney for Appellee.

(Here follows certified copy of Exhibit C.)

Filed November 29, 1919.

Date shipped.	From—	Destination.	Car number.	
1912.				
8-31	Vicksburg, Miss.	Port Arthur, Texas.	Mo. Pac.	31567
9- 4	"	"	I. V.	69414
9- 6	"	"	C. of N. J.	12253
9-19	"	"	C. H. & D.	17971
9-20	"	"	A. T. & S. F.	8499
10-23	"	"	N. Y. C. & H. R.	207752
11-11	"	"	A. C. L.	37180
11-15	"	"	B. L. & W.	29842
11-16	"	"	A. & W. P.	2704
11-30	"	"	P. & R.	2553
12- 2	"	"	C. B. & Q.	103553
12-17	"	"	Penn.	85432
12-23	"	"	C. M. & St. P.	85432
12-26	"	"	L. S. & M. S.	98550
12-26	"	"	G. T.	8776
12-30	"	"	C. R. I. & P.	72593
12-31	"	"	A. C. L.	34721
12-31	"	"	Mo. Pac.	33937
1913.				
1- 2	"	"	Sou.	38486
1- 7	"	"	C. M. & St. P.	55776
1- 9	"	"	G. T.	12714
2-17	"	"	Wabash	65329
2-22	"	"	A. C. L.	25482
2-25	"	"	Sou.	39083
2-26	"	"	C. B. & Q.	107456
3-22	"	"	W. J. S.	90522
4-11	"	"	Erie	108706

I hereby certify that this statement has been checked against the records of th

"Exhibit C."

nt on Award for Reparation.

	Routed.	Weight.	Charges collected.	Reparation at 4¢ per 100 ℔.
		Brought forward		$4,288.80
	V. S. & P. K. C. S.			
7	T. & Ft. S.	51,200	$102.40	20.48
4	"	51,200	102.40	20.48
5	"	57,000	114.00	22.50
1	"	48,800	97.60	19.52
9	"	74,300	148.60	29.72
2	"	49,500	99.00	19.80
1	"	54,600	109.20	21.84
2	"	61,600	123.20	24.64
4	"	55,800	111.60	22.32
3	"	54,800	109.60	21.92
3	"	60,900	121.80	24.36
2	"	52,000	104.00	20.80
2	"	69,400	138.80	27.76
1	"	67,200	134.40	26.88
3	"	58,500	117.00	23.40
3	"	49,800	99.60	19.92
3	"	55,100	110.20	22.04
7	"	64,100	128.20	25.64
3	"	55,300	110.60	22.12
3	"	55,300	101.40	20.28
4	"	60,000	120.00	24.00
1	"	56,900	113.80	22.76
2	"	45,500	111.00	22.20
3	"	60,200	120.40	24.08
3	"	67,500	135.00	27.00
2	"	44,100	88.20	17.64
3	"	58,200	116.40	23.28
				$4,906.48

____ ____,

Attorney for Anderson-Tully Co.

f this company, and found correct.

____ ____,

Auditor Texarkana & Fort Smith Railway Co.

UNITED STATES OF AMERICA:

District Court of United States, Western Division of the Southern District of Mississippi.

I, Jack Thompson, Clerk of above named court hereby certify that the above and foregoing is a full, true and correct copy of Exhibit C, to Petition for Judgment upon award of Reparation by Interstate Commerce Commission, in Cause No. 324 The Anderson-Tully Company vs. The Vicksburg, Shreveport and Pacific Railway Company et al., now on writ of error from this court to the United States Circuit Court of Appeals for the Fifth Circuit, as fully as the same appears on file and of record in this office.

Witness my hand and official seal at Vicksburg, Mississippi, this the 19th day of November, 1919.

[SEAL.]
(Signed) JACK THOMPSON, *Clerk.*
J. H. SHORT,
Deputy Clerk.

Argument and Submission.

Extract from the Minutes of December 3rd, 1919.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et als.

versus

ANDERSON-TULLY COMPANY.

On this day this cause was called, and, after argument by J. M. Souby, Esq., for plaintiffs in error, and R. G. Brown, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed December 10th, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et al., Plaintiffs in Error,

vs.

ANDERSON-TULLY COMPANY, Defendant in Error.

Error to the District Court of the United States for the Southern District of Mississippi.

S. W. Moore, J. C. Theus and J. M. Souby, Attorneys for Plaintiffs in Error.
R. G. Brown, Attorney for Defendant in Error.

Before Walker, Circuit Judge, Foster and Grubb, District Judges.

GRUBB, *District Judge:*

This is a writ of error to a judgment of the District Court for the Southern District of Mississippi in favor of the defendant in error (plaintiff below) and against the plaintiffs in error (defendants below) rendered in a suit brought by the plaintiff as a shipper against the defendants as common carriers upon an award of reparation of the Interstate Commerce Commission, in favor of the plaintiff and against the defendants.

Three objections to the correctness of the judgment are presented by the appeal. (1) As to the jurisdiction of the District Court for the Southern District of Mississippi. (2) As to whether the complaint sets out a cause of action. (3) As to whether the proof supported the judgment.

1. The jurisdiction of the District Court was timely challenged upon two grounds: (*a*) that there was no venue in the District, where the suit was brought, and (*b*) that there was no service upon the defendant, the Vicksburg, Shreveport & Pacific Railway Company.

(*a*) The 16th Section of the Act to Regulate Commerce, approved February 4th, 1887, together with its various subsequent amendments, provided that if a carrier should not comply with an order of the Interstate Commerce Commission for the payment of money within the time set in the order, the plaintiff might sue for the enforcement of the order in any Circuit (District) Court of the United States in which he resided or in which was located the prin-

cipal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties. Jurisdiction was invoked by the plaintiff upon the theory that the road of the defendant, the Vicksburg, Shreveport & Pacific Railway Company, ran through the Southern district of Mississippi. This was disputed by the defendants. The facts relating to its stipulated in the record are as follows: The Vicksburg, Shreveport & Pacific Railway Company operated a line from Shreveport to Vicksburg, as a common carrier of passengers and freight. Its own rails stopped at Delta, La., across the Mississippi River from Vicksburg. Its trains were transferred by ferry boat across the river. Its engines and engine crews went no further east than Delta. Its passenger coaches and train crews crossed the river to the terminal at Vicksburg. Its trains, after they had reached the east side of the river, were handled by the engines of the Alabama & Vicksburg Railroad Company between the transfer boat and the Vicksburg terminal and vice versa. It had an arrangement with the Alabama & Vicksburg Railroad Company for the handling of its trains by the engines and engine crews of the latter, and for a joint use with it of the Vicksburg terminal. It also had a contract with the corporation which handled the ferry boat for the handling of its cars over the river. In view of these facts, we think the instrumentality through which the business of the Vicksburg, Shreveport & Pacific Railroad Company, as a carrier, was conducted, viz:—the transfer boat, the tracks and terminal of the A. & V. R. R. Co., were well held to be a part of the road of the Vicksburg, Shreveport & Pacific Company. Ownership of them was not essential and the word "road" includes other instruments than tracks. If the defendant, in order to conduct its business as a carrier of passengers, made use of instrumentalities, other than railroad track, and owned by others than defendant, but which it had the contractual right to use in its business, and which were located in the southern district of Mississippi; this was enough to show venue in the District Court of that District. The stipulation shows that such was the case.

The plaintiff in error contends that Section 16 has been repealed by implication by the Act of October 22nd, 1913, which abolished the Commerce Court, and which provided that "the venue of any suit to enforce, suspend, or set aside, in *hold* or in part, any order of the Interstate Commerce Commission, shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." The purpose of the Act of October 22nd, 1913, was to abolish the Commerce Court and to redistribute its jurisdiction. The Act of October 22nd, 1913, provides that "the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all acts or parts of acts, in so far as they relate to the establishment of the Commerce Court are repealed." The Commerce Court was never vested with jurisdiction to enforce awards of money reparation made by the Interstate Commerce Commission in favor of shippers. Legislation, the design of which was only to abolish the

Commerce Court, should not be held to change by implication a procedure that related exclusively to courts other than the Commerce Court. The venue fixed by the Act of October 22nd, 1913, of suits brought to enforce, suspend or set aside orders of the Interstate Commerce Commission, is limited to suits to enforce, suspend or set aside orders of the Commission which the Commerce Court had been vested with jurisdiction of, and which did not include reparation order suits. The limitation as to venue should be held to apply only to the class of cases jurisdiction of which was transferred from the Commerce Court to the District Courts by the terms of the Act of October 22nd, 1913.

(*b*) It is contended that the defendant, the Vicksburg, Shreveport & Pacific Railway Company, was not properly served. The return of the Marshal is that the summons was "executed by handing a true copy of this Summons and Petition for Judgment to Austin King, Freight Agent for the V. S. & P. R. R. Co., Vicksburg, Miss., Dec. 4, 1919." Plaintiff in error contends that the defendant railroad was then in Government operation and control, of which the Courts take judicial notice and hence, that the person served was an employe of the Government and not an agent of the carrier. The return is to the effect that, at the time of service, to whom the copy was handed, was an agent of the defendant railroad company. The return so long as its recital is unamended, is conclusive of the character of the person served. The fact that King was an employee of the Government would not necessarily prevent his being also and at the same time an agent of the carrier, for the transaction of its business, such as the settlement of claims antedating Government operation. Section 10 of the Act, which provides for government control, prescribes that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now prescribed by law." This would seem to authorize suits on causes of actions against the carriers themselves to be brought on service upon former agents of the carrier who continued to be agents of the Government under its operation.

2. The complaint is criticized because it does not charge that the rate was unreasonable in fact. No demurrer was interposed to it and objection was first made to it after judgment. If the complaint sets out a cause of action, no matter how imperfectly, it will withstand objection first made after judgment. The action sued on is a specific one, created by the Act to regulate Commerce. Section 16 of that Act provides that if the carrier does not comply with an order for the payment of money within the time set in the order, the complainant may file in the Circuit (District) Court of the United States a petition setting forth briefly "the causes for which he claims damages and the order of the Commission in the premises." It also gives to the award and order of the commission the force of prima facie evidence of the facts contained in it. The purpose of the action is the enforcement of the award. In view of the peculiar nature of the action we think that a complaint which sets out the findings of the Commission and its order, and claims damages due

the plaintiff under it, was sufficient to withstand objection made for the first time after judgment that it showed no cause of action. The finding of the Commission that the rate was unreasonable was made prima facie evidence of that fact. The plaintiff, to sustain his complaint, was required to offer no evidence, except the award and order of the Commission. His averment was as broad as his proof was required to be. The action was a statutory one to enforce the award of the Commission, and by the statute, proof of the award of the Commission was prima facie sufficient to sustain the plaintiff's case. The statute requires the petitioner merely to set out the causes for which the plaintiff claims damages and the order of the Commission in the premises. The defendants had full information from the complaint as to the cause of action they were required to meet. Technical rules of common law pleading are inapplicable to the statutory form of action, created by the Act to Regulate Commerce for the enforcement of order of the Commission.

3. The plaintiff in error contends also that the evidence does not support the judgment. The case was tried by the District Judge, a jury having been waived. The District Judge was not requested to make special findings, and did not make any. The general finding of the District Court has the effect of the verdict of a jury, and the judgment upon it is subject to review only because of errors of law, based on rulings of the Court, which were excepted to during the progress of the trial. No rulings of law were invoked by the plaintiff in error during the trial or excepted to; nor were there any exceptions to the rendition of judgment. The ruling of the Court below on the motion for a new trial, to the denial of which the defendants did except, is not reviewable in the Federal Court.

We may say, however, that the Court properly rendered judgment for the plaintiff in view of the state of the record. The judgment recites that the plaintiff offered the award and order of the Commission and rested, and that the defendants introduced no evidence. The Act of Congress gives to the award and order of the Commission prima facie effect, and it does this, regardless of the correctness or incorrectness of the findings of the Commission. The defendants are not permitted to destroy this prima facie effect by internal criticisms of the Commission's findings. The defendants have the right to overcome the prima facie effect of the findings of the Commission in a suit to enforce the award in the District Court only by offering evidence in that court tending to impeach their correctness. If the defendants offer no evidence to rebut the prima facie case made by the plaintiff's introduction of the award and order of the Commission, then the District Court has nothing to do but apply the statute and render judgment for the plaintiff on the unrebutted prima facie case made by him. The Act of Congress provides that "on the trial in such suits, the findings and order of the Commission shall be prima facie evidence of the facts stated therein." The unreasonableness of the rate and the amount of plaintiff's damage caused thereby, were found by the Commission. The introduction of the award and order of the Commission showed prima facie that the rate was unreasonable and that the plaintiff was injured thereby to the extent of the

award. If the defendants declined to introduce evidence to rebut the plaintiff's case so made, the District Judge had no alternative than to render judgment. He did not rule that defendants could not rebut the prima facie case made by plaintiffs but that they had not done so, and, not having done so, that he was required to treat the plaintiff's prima facie case, which was unrebutted, as entitling the plaintiff to a judgment.

The judgment of the District Court is affirmed.

Judgment.

Extract from the Minutes of December 10th, 1919.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et als.
versus
ANDERSON-TULLY COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiffs in error, Vicksburg, Shreveport & Pacific Railway Company, Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, and the surety on the writ of error bond herein, United States Fidelity & Guaranty Company, be condemned, in solida, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Petition for Rehearing.

Filed December 29, 1919.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et al.,
Plaintiffs in Error,
vs.
ANDERSON-TULLY COMPANY, Defendant in Error.

Petition for Rehearing.

Come now the plaintiffs in error and move the court to grant a rehearing in this cause, and respectfully state, without argument, the grounds therefor:

I.

The sufficiency of the facts, found by the Commission and adopted by the lower court, to support the judgment may be examined in this Court without the necessity of any exceptions.

Where a jury is waived in an action at law and special findings are made by the court, no exception is necessary to raise the question whether the facts found support the judgment.

In Seeberger v. Schlesinger, 152 U. S. 581, it is said:

No exception is necessary in case of special findings by the court to raise the question whether the facts found support the judgment.

To the same effect are Hooven v. Featherstone, 111 Fed. 81; Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401; Mercantile Trust Co. v. Wood, 60 Fed. 346; Chicago R. R. Co. v. Barrett, 190 Fed. 118, 123; Mutual Life Insurance Co. v. Kelly, 114 Fed. 268, 271.

But it is not necessary that the facts be actually found by the court. It is sufficient if the ultimate facts are made to appear at the trial in some form or other, which is a substantial equivalent to such finding. Thus in Wayne v. Kennicott, 103 U. S. 554, it was held that if there be an agreed statement of facts submitted to the trial court, upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. In Philadelphia Casualty Company v. Fechheimer, 220 Fed. 401, 409, the facts stated in the report of the referee and adopted by the court were held to be the equivalent of a special finding. In Anderson v. Messinger, 146 Fed. 929 "mutual stipulations which are incorporated in the bill of exceptions" were held to be the equivalent of special findings. In Guaranty Trust Company v. Koehler, 195 Fed. 669, it was held that special findings of fact of the referee became the special finding of the court, and the writs of error presented the question whether or not this finding warranted the judgment below, and if not, what judgment it did warrant. Even where counsel agree in the appellate court to certain portions of the opinion of the trial court, as containing the material facts of the case, it is said in Louisiana Mutual Insurance Co. v. Tweed, 7 Wall. 44, that this is sufficient to raise on appeal the question of the sufficiency of the facts to warrant the judgment. The court said:

Inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made.

In the instant case, the report and order of the Commission were prima facie evidence of the truth of the Commission's findings of fact. When the defendants introduced no testimony to rebut the prima facie case, it became absolute. At that moment, therefore, there was a statement of facts made partially by operation of law, and partially by the acquiescence of the defendants, which was the equivalent of a special finding by the court. This statement of facts was acted upon by the trial court and judgment pronounced on it. No exception was required.

If the law had made the Commission's finding of fact conclusive then everyone must admit that the Commission's report when introduced in evidence performed the office of special findings or an agreed statement of facts. But here the prima facie case became conclusive when the defendant accepted the facts as asserted by the plaintiff.

This, apparently, is the view taken by plaintiff's counsel, who says in his brief, page 19:

The defendants introduced no evidence. The prima facie evidence thereupon became conclusive and the trial judge gave judgment in favor of plaintiff.

The ultimate facts being thus established, the lower court held that they warranted the judgment for the plaintiff, and this appeal raises the question of the sufficiency of those facts to sustain the judgment, even though no exception was taken.

The court says in this case:

The general finding of the District Court has the effect of the verdict of a jury and the judgment upon it is subject to review only because of errors of law based on rulings of the court, which were excepted to during the progress of the trial.

But this is completely answered, it is respectfully submitted, in Wayne County v. Kennicott, 103 U. S. 554, where the court said:

This record shows distinctly that the court was only required to determine whether in law on the agreed facts the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiff on the case as stated.

II.

The facts found by the Commission, and virtually adopted by the lower court as its special findings, were insufficient to support the judgment rendered.

The Commission did not find that the 20 cent rate was inherently unreasonable or unreasonable per se. It found it to be unreasonable for the sole reason that under the Commission's rule of practice there exists a presumption of unreasonableness wherever a joint rate exceeds the aggregate of intermediate rates. We contend that the effect of the protection afforded by the fourth section application was to destroy absolutely this presumption, and hence there being no presumption, there could be no lawful finding of unreasonableness which depended upon it for its existence.

In other words, the entire findings must be read and considered together. If in legal effect one finding destroys or neutralizes another, then the latter cannot be made the foundation of the judgment. The finding of the Commission (Rec. 42) clearly indicates that the Commission's finding of unreasonableness was based on a presumption. It says:

However, we have consistently held that a joint rate which exceeds the aggregate of the intermediate rates is prima facie unrea-

sonable; and that the burden is upon the carrier to defend the higher joint rate.

The findings of the Commission contain no other basis for the finding of unreasonableness than the statement just quoted.

But as a legal proposition this presumption is non-existent, for the reason that there was pending at the time a fourth section application which protected the discrepancy between the through rate and the aggregate of intermediate rates. This is apparent from the Commission's statement (Rec. 45):

The previous discrepancy between the through rate and the aggregate of the rates to and from Delta Point was protected by an appropriate fourth section application.

The fourth section application legalizes, during its pendency, this discrepancy. This arises from the express language of the amended fourth section. Under the statute, the discrepancy was lawful. From a lawful discrepancy no presumption of unlawfulness or unreasonableness can possibly arise. The result is that the Commission's presumption of unreasonableness, said to arise from this discrepancy, is completely neutralized by the protection afforded by the pending fourth section application.

Hence, the findings as made by the Commission do not authorize or justify a judgment in favor of the plaintiff.

The court in this case says:

The defendants are not permitted to destroy this prima facie effect by internal criticisms of the Commission's findings.

But does this rule prevent us from contending that, taken as an entirety, the findings do not authorize the judgment rendered in the trial court. For illustration, if the Commission's findings of fact affirmatively established that the cause of action was barred by a statute of limitations which extinguished the right of action, or that the claim for which reparation was sought had been paid, or was not the property of the plaintiff, and the court nevertheless should render a judgment for the plaintiff, it would be the duty of the appellate court to declare that the facts found did not support the judgment and hence it should be reversed.

Our contention here is the same as the contention in Michigan Central Railroad Co. v. Elliott, 256 Fed. 18 (Court of Appeals, Second Circuit), where the court said:

On the very finding of the Commission, judgment should have been given for defendants.

In conclusion, we beg to quote the following from Appalachia Lbr. Co. v. R. R. Co., 25 I. C. C. 173, 197, where the Commission itself has given to fourth section applications the construction and effect for which we are contending:

The fourth section as originally enacted was not effective in preventing a violation of the long and short haul rule, and it has been for many years understood that this rule was habitually disregarded. By amendment effective June 18, 1910, that section was strengthened. This amendment provided that in cases where the rule of the fourth section was being violated carriers might file with the Commission, on or before a certain date, applications asking leave to con-

tinue to disregard the long and short haul rule, and that no carrier should be treated as in default of the amended fourth section until the Commission had investigated and passed upon this application.

Under this provision over 5,000 applications were filed before the date fixed, and these two applications were among that number. Now, we think that it plainly appears, from the action of Congress in providing that no carrier should be proceeded against for a violation of the fourth section until its application has been acted upon, that it was the intent of Congress to say that matters should be left in statu quo until that time. It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the law-making authority had expressly sanctioned existence of such disregard.

III.

The Act of October 22, 1913, did repeal by implication certain portions of amended Section 16 of the Interstate Commerce Act, and this fact taken in connection with the express language of the venue provision indicates the intention of Congress, in restoring jurisdiction over orders of the Interstate Commerce Commission to the District Court, to enact a comprehensive law covering the venue of all actions affecting such orders, whether to enforce them or to set them aside.

Notwithstanding the fact that the Act abolishing the Commerce Court contains the provision that "all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed," the effect of the Act beyond question is to repeal the following paragraph of amended Section 16 of the Interstate Commerce Act:

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, the court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The intention of Congress, therefore, to repeal a part of amended Section 16 is plain and unmistakable, and yet this is not a matter which relates "to the establishment of the Commerce Court."

The intention of Congress to repeal a part of amended Section 16 being thus manifested, there is no reason to suppose that Congress intended the amendment of Section 16 to be limited to the subject matter above quoted. Had such been its intention, the venue provision would have contained language specifically excluding actions for the payment of money and would have read thus:

The venue of any suit hereafter brought to enforce, suspend or set aside in whole or in part any order of the Interstate Commerce Com-

mission (except an order for the payment of money) shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made.

But Congress excluded from the venue provision the language in parenthesis, "except orders for the payment of money," and this is the strongest evidence of the intention of Congress that the venue provision should apply to the enforcement of all orders of the Commission, whether for the payment of money or otherwise.

Since it is apparent that Congress intended to amend a part of Section 16, is there any reason to suppose that it intended to limit the amendment to the subject matter in the first quotation above, and not to the matter of venue, particularly when it employed language sufficiently broad and comprehensive to include by its express terms a modification of the venue provision in Section 16 concerning the enforcement of orders of the Commission for the payment of money.

IV.

The lower court was without authority to allow an attorney's fee and erred in so doing.

While the contention set forth in this heading was not the subject of any assignment of error, yet the court may notice a plain error, such as this, although not specifically assigned.

The allowance of the attorney's fee was premature. Section 16 does not permit the taxation of an attorney's fee until it has been finally determined that the plaintiff is entitled to prevail.

In Missouri Pacific Ry. Co. v. Sawmill Co., 235 Fed. 474 (Court of Appeals, Eighth Circuit), which was an action to enforce an award of reparation made by the Commission, an attorney's fee had been taxed by the lower court. This was held to be error. The court said:

> It is also objected that the court erred in allowing an exorbitant and excessive attorney's fee. Section 16 of the Act provides:
>
> "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."
>
> It appears, therefore, as matter of law, that the attorney fee was prematurely taxed, as it was not known when it was taxed whether the plaintiff would finally prevail or not.

As a result of a careful examination of the whole record, we are of the opinion that the judgment below must be affirmed as to the amount of reparation and interest; that as to the attorney fee it should be reversed.

Respectfully submitted.

S. W. MOORE,
J. C. THEUS,
J. M. SOURY,
Attorneys for Plaintiffs in Error.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded and the case is one in which the prayer of the petitioners should be granted by this Court.

S. W. MOORE,
Of Counsel for Petitioners.

Motion of Defendant in Error for Allowance of Attorney's Fee.

Filed January 10, 1920.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et al.,
Plaintiffs in Error,

vs.

ANDERSON-TULLY COMPANY, Defendant in Error.

Now comes the defendant in error, the Anderson-Tully Company, and moves the Court to fix and allow to its counsel a reasonable fee for services rendered in the above entitled cause upon the appeal herein.

Defendant in error shows to the Court that at the conclusion of the trial before the District Court, a motion was made orally that the Court fix a reasonable fee for counsel for plaintiff in the Court below as provided in Section 16 of the Act to Regulate Commerce; that thereupon it was agreed between counsel representing the plaintiff and defendants in the lower Court that a reasonable fee for services rendered up to judgment would be ten per cent upon the amount of recovery, and that such judgment was rendered by the District Judge.

Defendant in error now shows that an appeal was taken by the carriers, which necessitated the preparation of briefs in that Court, and argument of the case before the Court, and that now a petition for rehearing has been filed, which it is necessary for counsel for defendant in error to answer. Defendant in error shows to the Court that a fee which would be reasonable had the litigation ended in the District Court will not be reasonable unless compensation is made in this Court for the services rendered upon appeal.

Wherefore, defendant in error moves the Court to fix a reasonable fee for its counsel for the services rendered in this Court.

All of which is respectfully submitted.

(Signed) R. G. BROWN.
Atty. for Defendant in Error.

Service of above motion acknowledged this 3rd day of January, 1920.

(Signed) S. W. MOORE.
Atty. for Plaintiffs in Error.

Reply to Petition for Rehearing.

Filed January 12, 1920.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et als., Plaintiffs in Error,

vs.

ANDERSON-TULLY COMPANY, Defendant in Error.

Reply to Petition to Rehear.

The parties will be styled as in the lower Court.

I.

The contention of counsel for defendants, that the judgment of the District Court was based upon a "special findings of facts," and that no exception was necessary in the lower Court in order for this Court to examine into the facts, is without merit:

(*a*) Because there was no finding of facts by the District Judge, but merely a declaration of law.

(*b*) Because, even if the "report and order" of the Commission be treated as a finding of facts, they fully support the judgment of the lower Court.

It is respectfully submitted that when the plaintiff in the lower Court introduced in evidence the "report and order" of the Commission, of date July 8, 1918, a prima facie case for plaintiff was made out provided that "report and order" showed facts sufficient to support a judgment.

What did they show?

1. That the joint rate from Vicksburg to Port Arthur, 20 cents, was unreasonable to the extent that it exceeded 16 cents, the aggregate of the contemporaneously applicable intermediate rates.

2. That the material shipped was box shooks, which took the 16 cent rate.

3. That the plaintiff made the shipments described in the original report and paid and bore the charges thereon.

4. That it was damaged to the extent of the difference between the charges paid and those that would have accrued at the rate found reasonable.

5. That the plaintiff was entitled to reparation in the sum of $4,906.48, with interest at six per cent from March 14, 1912.

There is not one word said in this "report and order" as to why the Commission found the rate to be unreasonable, or upon what evidence. There is not one word said about there being a 4th Section application pending at the time the claim for reparation was made, or upon what ground this "application" was held not to protect the carriers in their overcharge to the shipper. All of this was a matter of evidence, competent to be introduced by the defendants, if they desired to do so, and the plaintiff had the record in Court and offered to allow the defendants to use it. They refused to do so, but stood mute, and did not even ask for a declaration of law in their favor, or move for judgment. At no stage of the proceedings in the lower Court were any of these matters brought to the notice of the trial judge, nor was he asked to rule upon them.

Can it be done now, upon appeal, and based upon a manufactured record?

The trial Judge did not find any facts, but held, merely as a matter of law, that the "report and order" of the Commission entitled the plaintiff to judgment, they being uncontradicted and the "report and order" being made competent evidence by the terms of the statute.

There was no "agreed statement of facts," no "report of a referee, adopted by the Court," and no mutual stipulations incorporated in the bill of exceptions." This case was fought out in the lower Court at arm's length; the plaintiff proved its case, by competent, legal evidence, and the defendants failed utterly to establish the defenses set up in their answer. There was a general finding by the District judge in favor of the plaintiff, based upon the uncontradicted evidence, not upon any "agreed statement of facts," or a "special finding of facts." The cases cited by counsel in the petition to rehear, at page 2, will not be found to bear the construction placed upon them by adversary counsel. For example, in Guaranty Trust Co. v. Koehler, 195 Fed., 699, there was an express agreement that there should be special findings of fact and declarations of law by the referee, and that these should also, to the extent to which they were adopted by the trial Judge, be his special findings of fact and declarations of law.

II.

The facts found by the Commission were sufficient to support the judgment.

On the face of the award, made the basis of this suit, the report and order of July 8, 1918, the Commission did find the 20 cent rate unreasonable per se; at least, it found it to be unreasonable without assigning any ground for its finding. Even if this Court should feel at liberty to examine the former report of the Commission, improperly injected into this record at pages 41 to 44, it will find that, although the Commission stated the uniform rule was to hold a through rate to be unreasonable prima facie, where it exceeded the aggregate of the intermediate rates, and that the burden is upon the

carrier to defend the higher joint rate, yet the Commission found, "upon the facts of record," that the 20 cent rate was unreasonable.
Trans. of Rec., 43.

This finding by the Commission was upon conflicting evidence.
Original Brief for appellant, p. 52.

There is no "long and short haul" proposition involved in this case. As counsel for plaintiff understands this feature of rate making the carriers had been accustomed to make a less rate for the long haul than the aggregate of some intermediate rates; and this was allowed by the Commission on the ground of water competition, or other rail competition. But the case is entirely different when the long haul rate is greater than the aggregate of the intermediates. There can be no justification for this, as it gives an undue advantage to the shipper from an intermediate point, where there is no competition. As the Commission stated in its first opinion, such a rate is prima facie unreasonable, and, therefore, illegal. This rule of the Commission was enacted into law on June 18, 1910. The carriers were not required to change the rate so long as they had an application to change it before the Commission, undisposed of. This, however, did not legalize the discriminatory rate, nor protect the carrier when called upon by a shipper to make reparation for an unjust discrimination. There were penalties provided for the violation of the 4th Section, and these could not be enforced so long as the carrier stood ready to abide by the order of the Commission upon its application; but it would work an injustice to the shipper, which the Act of June 18, 1910, never contemplated, if the shipper should be deprived of reparation on account of unjust discrimination.

III.

Counsel for plaintiff is content to abide by the representation of the question of venue, as made in his original brief, and as adjudged in the opinion, and sees nothing in the petition to rehear which calls for further elaboration on this point.

IV.

The petition to rehear undertakes to formulate and present a brand new "specification of error," no intimation of which was given in the "Assignments of Error" filed in the lower Court, or in the "Specifications of Error" set out in appellant's original brief in this Court; viz: that the lower Court was without authority to allow an attorney's fee and erred in so doing.

It might be sufficient to say that, as no exception was taken to the allowance of the fee by the District Judge, no assignment of error predicated upon it in the lower Court, and no reference made to it upon the hearing in this Court, the objection comes too late. Counsel for appellant has cited one case from the Court of Appeals, Eighth Circuit, Mo. Pac. Ry. Co. vs. Sawmill Co., 235 Fed., 474,

which, while not dealing with the objections above set out, does hold, squarely, that the attorney's fee provided for in Sec. 16 of the Act to Regulate Commerce was prematurely assessed at the conclusion of the *the* trial had in the District Court. The reason given by the eminent Justices of the Eighth Circuit for so holding is that the plaintiff could not know at that time whether he would finally prevail.

With all due respect to these eminent Justices, the proposition they advance and the doctrine they have enunciated is utterly unsound. The plaintiff could not know at the conclusion of the trial that the defendant would prosecute an appeal. The statute does not say, "when the petitioner shall have finally prevailed, he shall be allowed a reasonable attorney's fee." The time when the fee shall be allowed is not indicated, save that it shall be taxed and collected as part of the costs. Now it is the universal rule that costs are allowed when the judgment is rendered; and, if the amount of any item of the costs is not fixed by statute, such as compensation to receivers, fees for guardians ad litem, etc., it is then fixed and allowed by the Court. If unsatisfactory to any party, exception is then made, in order that the appellate Court may review the action of the lower Court. If no exception is taken, the action of the lower Court is final.

In the present case, if counsel may be permitted to go a little outside of the record, the defendants have been peculiarly unfortunate on account of the abundance of their counsel. Mr. Souby, alone, threshed out the case before the Commission, only Judge Theus appeared before the District Court, Mr. Souby was again solus before this Court upon appeal, and now Mr. Moore files the petition to rehear. As a result, neither one of them is familiar with all of the incidents of the litigation, and it illustrates the truth of two proverbs, "too many cooks spoil the broth," and "never swap horses while crossing a stream." If the draftsman of the petition to rehear had taken any part in the trial in the District Court, he would have known that it was agreed, in open Court, by Judge Theus, that the fee of plaintiff's counsel for services rendered up to that date should be ten per cent upon the amount of the recovery, which, at the time, had not been calculated. This accounts for the unusual amount, $691.05. Except for this agreement of counsel, evidence would have had to be adduced before the trial Judge as to what would be a reasonable fee for services before the District Court.

In the reply brief, plaintiff's counsel has asked this Court to allow him a reasonable compensation for services rendered in connection with the appeal, which has not been done, and he now renews this request and has filed a formal motion to that effect.

Outside of this agreement of counsel, not only as to the amount of the fee, but as to its being allowed at that time by the District Judge, the universal practice, so far as counsel is advised, is for fees of this character to be fixed by the nisi prius Court for services rendered up to the date of the judgment. If further services are rendered in connection with the appeal, and counsel cannot agree upon the amount, it might be necessary to remand the case, with instructions to submit

proof upon this matter. In equity cases of a similar nature, general creditors' bills, receiverships, etc., the Chancellor refers the matter to the Master to take proof and report what would be reasonable fees to be allowed up to the entry of the final decree, and the appellate court makes an additional allowance for services rendered in connection with the appeal. It is most respectfully submitted that the procedure indicated by the decision in the Eighth Circuit is neither reasonable, nor in accord with the statute, nor the practice of either the State or Federal Courts.

In the case of Meeker vs. Lehigh Valley R. R. Co., 236 U. S., 412, 59 Law Ed., 644, this matter was fully gone into, on error assigned for the first time in that Court. An allowance of $20,000.00 had been made for counsel fee in the District Court, and an appeal was prosecuted to the Circuit Court of Appeals, Third Circuit, where the District Court was reversed.

128 C. C. A., 311.

No report has been made of the proceedings in the District Court, and the reversal in the Circuit Court of Appeals rendered it unnecessary, of course, to pass upon the matter of the allowance for counsel fees. Upon appeal to the Supreme Court, however, the Court of Appeals was reversed, and the allowance of counsel fees made by the District Court, was affirmed.

If the position taken by the Eighth Circuit was correct, the matter of allowance for counsel fees would have been remanded to the district court.

It is further respectfully submitted that, if this Court should be of opinion that the Counsel fee should be allowed only after plaintiff has finally prevailed, then it would be incumbent upon this Court, in affirming the judgment of the District Court, to make an allowance for a reasonable fee for the services of counsel in both Courts. As the usual rule is to allow the appellate court fifty per cent of the fee allowed in the lower court, counsel asks for an allowance of $346.00 for services in this court.

It is respectfully submitted that there is no merit in the petition to rehear, and that same should be disallowed; that the judgment of the District Court should be affirmed and a proper fee fixed by this Honorable Court for counsel for defendant in error.

R. G. BROWN,
Atty. for Defendant in Error.

Order Denying Rehearing.

Extract from the Minutes of January 19th, 1920.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et als.

versus

ANDERSON-TULLY COMPANY.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

Order Denying Motion for Allowance of Attorney's Fees.

Extract from the Minutes of February 6th, 1920.

No. 3388.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY et als.

versus

ANDERSON-TULLY COMPANY.

It is ordered by the Court that the motion of the defendant in error herein for the allowance of attorney's fees, be, and the same is hereby, denied.

Petition for Writ of Error and Order Allowing Same.

Filed February 24, 1920.

United States Circuit Court of Appeals, Fifth Circuit.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, Plaintiffs in Error,

vs.

ANDERSON-TULLY COMPANY, Defendant in Error.

The Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a final judgment has therein been rendered on the 10th day of December, 1919, affirming the judgment of the District Court of the United States for the Western Division of the Southern District of Mississippi in favor of said An-

derson-Tully Company, and against them, in the sum of Six Thousand, Nine Hundred and Ten and 56/100 ($6,910.56) Dollars; that on December 29th, 1919, they filed herein their motion for rehearing, which was by said Circuit Court of Appeals overruled on the 19th day of January, 1920; that this cause is one which arises under the Act to Regulate Commerce, approved February 4th, 1887, and acts amendatory thereof and supplementary thereto; that it is a cause in which the United States Circuit Court of Appeals for the Fifth Circuit has not final jurisdiction, and is a proper case to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, the said plaintiffs in error pray that a writ of error do issue in their behalf directing that the transcript of the record and proceedings, and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said plaintiffs in error, may be reviewed, and that if error be found, the same may be corrected according to the laws and customs of the United States.

(Signed) J. BLANC MONROE,
S. A. MOORE,
J. C. THEUS,
Attorneys for Plaintiffs in Error.

Writ of error allowed, and bond in the sum of Ten Thousand ($10,000.00) Dollars is hereby approved to operate as a supersedeas, this 24th day of February, A. D. 1920.

(Signed) R. W. WALKER,
Judge United States Circuit Court of Appeals, Fifth Circuit.

Assignment of Errors.

Filed February 24, 1920.

United States Circuit Court of Appeals, Fifth Circuit.

Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, Plaintiffs in Error,

vs.

Anderson-Tully Company, Defendant in Error.

Now come the above named plaintiffs in error (who were defendants below, and are herein referred to as defendants), Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, by their attorneys, and say that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

The Circuit Court of Appeals erred in sustaining the action of the District Court in overruling defendant's pleas to the jurisdiction.

II.

The Circuit Court of Appeals erred in holding that the venue of the case was governed by amended section 10 of the Interstate Commerce Act, and not by the venue provision of the Act of Congress approved October 22, 1913.

III.

The Circuit Court of Appeals erred in holding that the road of the defendant, Vicksburg, Shreveport & Pacific Railway Company, ran in Warren County, Mississippi, within the meaning of said amended section 10.

IV.

The Circuit Court of Appeals erred in holding that the attempted service of summons upon said defendants, by delivering copies of said summons to agents of the Director General of Railroads, constituted valid service.

V.

The Circuit Court of Appeals erred in failing to hold that plaintiff's petition does not state facts sufficient to constitute a cause of action against defendants, or any of them.

VI.

The Circuit Court of Appeals erred in failing to hold that the facts found by the Interstate Commerce Commission were insufficient to sustain a recovery by plaintiff.

VII.

The Circuit Court of Appeals erred in failing to hold that the District Court committed error in declaring the law to be that it could not inquire into or rule upon sufficiency of the findings of fact of the Interstate Commerce Commission to warrant a recovery by plaintiff.

VIII.

The Circuit Court of Appeals erred in failing to hold that the District Court committed error in rendering judgment for plaintiff upon the findings of fact made by the Interstate Commerce Commission, which were wholly insufficient to support a judgment for plaintiff.

and the Circuit Court of Appeals, because of such insufficiency, erred in affirming such judgment.

Wherefore, plaintiffs in error pray that the judgment herein be reversed and rendered in their favor or that the judgment be reversed and such direction be given as will insure to plaintiffs in error the full force and efficacy of the rights to which they are entitled by reason of the facts in this case, the law applicable thereto, and the defenses they have urged.

(Signed) J. BLANC MONROE,
S. A. MOORE,
J. C. THEUS,
Attorneys for Plaintiffs in Error.

Bond on Writ of Error.

Filed February 24, 1920.

United States Circuit Court of Appeals, Fifth Circuit.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, THE Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, Plaintiffs in Error,

vs.

THE ANDERSON-TULLY COMPANY, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That we, the Vicksburg, Shreveport & Pacific Railway Company, a corporation organized and existing under the laws of the State of Louisiana, The Kansas City Southern Railway Company, a corporation organized and existing under the laws of the State of Missouri, and Texarkana & Fort Smith Railway Company, a corporation organized and existing under the laws of the State of Texas, as Principals, and American Surety Co. of N. Y. as Surety, are held and firmly bound unto the above named, The Anderson-Tully Company, a corporation organized and existing under the laws of the State of Michigan, in the sum of Ten Thousand ($10,000.00) Dollars, to be paid to the said, The Anderson-Tully Company, its successors and assigns, for the payment of which well and truly made, we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 24 day of February, 1920.

Whereas, the above named, Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, have prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the United States Circuit Court of Appeals, Fifth Circuit.

Now, therefore, the condition of this obligation is such that, if the said Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY.

(Signed) By LARZ A. JONES, *Its President.*

[SEAL.] THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

(Signed) By G. B. WOOD, *Its Asst. to President.*

Attest:

(Signed) A. H. BARNES,
Asst. Secty.

[SEAL.] TEXARKANA & FORT SMITH RAILWAY COMPANY.

(Signed) By G. B. WOOD, *Its President.*

Attest:

(Signed) J. M. SOUBY,
Asst. Secty.

AMERICAN SURETY CO. OF N. Y.

(Signed) By CHAS. HOFFMANN, [SEAL.]
Res. Vice President.

Attest:

(Signed) C. MURPHY,
Res. Asst. Secretary.

The above and foregoing bond is hereby approved to operate as a supersedeas, this 24 day of February, 1920.

(Signed) R. W. WALKER,
Judge United States Circuit Court of Appeals, Fifth Circuit.

Attest:

[SEAL.] VICKSBURG, SHREVEPORT & PACIFIC RY. CO.

(Signed) W. B. OWEN,
Secretary.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 73 to 110 next preceding this certificate contain full, [illegible]

and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3388, wherein the Vicksburg, Shreveport & Pacific Railway Company, et als., are plaintiffs in error, and the Anderson-Tully Company is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 72 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of March, A. D. 1920.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you or some of you, between the Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, plaintiffs in error, defendants below, and Anderson-Tully Company, defendant in error, plaintiff below, a manifest error hath happened to the great damage of the said plaintiffs in error, the Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 24th day of February, in the year of our Lord One Thousand, Nine Hundred and Twenty.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Allowed by
R. W. WALKER,
U. S. Circuit Judge.

Clerk's Office.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's Office for the use of the defendant in error.

Dated at New Orleans, La., 24th day of February, 1920.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

[Endorsed:] No. 3388. In the United States Circuit Court of Appeals, Fifth Circuit. Vicksburg, Shreveport & Pacific Railway Company et als., Plaintiffs in Error, versus Anderson-Tully Company, Defendant in Error. Writ of Error. Filed 24 day of February, 1920. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

To Anderson-Tully Company, a corporation, and R. C. Brown, its Attorney of Record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein the Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. W. Walker, one of the judges of the United States Circuit Court of Appeals for the Fifth Circuit, this

24th day of February, in the year of our Lord, One Thousand, Nine Hundred and Twenty.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

B. W. WALKER,
Circuit Judge.

Due service of the foregoing citation hereby acknowledged and further notice waived, this 25th day of February, in the year of our Lord, One Thousand, Nine Hundred and Twenty.

R. G. BROWN,
Attorney for Defendant in Error.

[Endorsed:] No. 3388. United States Circuit Court of Appeals for the Fifth Circuit. Vicksburg, Shreveport & Pacific Railway Company et als., Plaintiffs in Error, vs. Anderson-Tully Company, Defendant in Error. Citation and acceptance of service. Filed 28th day of February, 1920. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 27,532. U. S. Circuit Court Appeals, 5th Circuit. Term No. 777. The Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, plaintiffs in error, vs. Anderson-Tully Company. Filed March 8th, 1920. File No. 27,532.

Supreme Court of the United States

OCTOBER TERM—1920.

No. 270.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA & FORT SMITH RAILWAY COMPANY,

Plaintiffs-in-Error.

vs.

ANDERSON-TULLY COMPANY,

Defendant-In-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFFS-IN-ERROR.

J. BLANC MONROE,
SAMUEL W. MOORE,
FRANK H. MOORE,
of Counsel.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City

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TEXT BOOK AND REPORTS.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 270.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA & FORT SMITH RAILWAY COMPANY,

Plaintiffs-in-Error,

vs.

ANDERSON-TULLY COMPANY,

Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Statement.

Plaintiffs in error will be referred to as defendants, and defendant in error, as plaintiff or complainant.

Briefly stated, the question upon the merits in this case is whether an order of reparation by the Interstate Commerce Commission can be sustained where:

1. The rate complained of had been established in 1910, at the request of complainant, and reparation was awarded on shipments moving shortly thereafter, that is, during the period from February, 1911, until October, 1913.

2. The rate was not found to be unreasonable, *per se*, and was permitted to continue in force for the future, although complainant had asked in its complaint for the establishment of a lower rate for the future.

3. The rate complained of applied via two practicable routes over both of which shipments had been transported, and as to both of which reparation was asked; and there was no award of reparation on shipments moving over the *shorter* route, but reparation was awarded on shipments moving over the *longer* route.

4. The only ground for the award against the carriers constituting the longer line was the fact that the through rate complained of was in excess of the sum of the intermediate rates, although (a) *this departure from the Fourth Section of the Interstate Commerce Act was protected by a Fourth Section application, as authorized by the Act*, and such departure had, prior to the hearing, been cured by increasing one of the intermediate rates so that the sum of the intermediates at the time of the hearing equaled the through rate, (b) there was no proof or finding that the intermediate rates were reasonable rates, and (c) these intermediate rates were only "paper" rates on which no traffic was moving during the period of the movements on which reparation was awarded (Record, pages 41-47).

The defendants also challenge the jurisdiction of the Court, and the sufficiency of plaintiff's petition.

Anderson-Tully Company, on February 14, 1913, filed a complaint before the Interstate Commerce Commission against the defendants, Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, and also against the Yazoo & Mississippi Valley Railway Company and New Orleans, Texas & Mexico Railway Company, attacking the joint through rate of 20 cents per 100 pounds, carloads, on box material or shooks from Vicksburg, Mississippi, to Port Arthur, Texas, as unreasonable and discriminatory in violation of Sections 1 and 3 of the Act to Regulate Commerce (Record, page 37). The rate complained of applied over two different routes, and all lines participating in the movement via either route were named as defendants. One route (herein referred to as the route via Shreveport) was via the Vicksburg, Shreveport & Pacific Railway from Vicksburg to Shreveport, Louisiana; thence over the Kansas City Southern and Texarkana & Fort Smith Railways (one system) to Port Arthur, a total distance of 398 miles; the other route (herein referred to as the route via Baton Rouge), was via the Yazoo & Mississippi Valley Railway from Vicksburg to Baton Rouge; the New Orleans, Texas & Mexico Railway from Baton Rouge to DeQuincy, Louisiana, and thence over the Kansas City Southern and Texarkana & Fort Smith Railways to Port Arthur, the total distance being 354 miles (Record, page 41).

The complaint before the Commission asserted that the rate on the commodity involved "from all

stations in Louisiana on the Vicksburg, Shreveport & Pacific Railway, including stations on the west side of the Mississippi River opposite Vicksburg, Mississippi, to Port Arthur, Texas," was 13 cents per 100 pounds; in view of which it was alleged that a rate greater than 13 cents per 100 pounds from Vicksburg to Port Arthur was unjust, unreasonable and discriminatory (Rec., page 37). Complainant asked that defendants be required to establish and maintain, for a period of two years, a rate not to exceed 15 cents per 100 pounds (Rec., page 38).

As appears from the Commission's report, dated May 4, 1914 (Anderson-Tully Company vs. Alabama & Vicksburg Ry., Unreported Opinion No. A-643, Record, page 41-44), it was shown, at the hearing, that the rate of 13 cents per 100 pounds, referred to in the petition as applying from stations on the Vicksburg, Shreveport & Pacific in Louisiana to Port Arthur was no longer in effect, but had been increased to 17 cents per 100 pounds on May 14, 1913. It was also shown at the hearing, for the first time, that the rate on the commodity in question from Vicksburg, on one side of the river, to Delta Point, on the other, was 3 cents per 100 pounds, thus making the combination or aggregate of the intermediate rates 16 cents per 100 pounds prior to May 14, 1913, or 4 cents less than the joint through rate complained of. All of these rates, except the through rate, were "paper" rates (Rec., pages 41-43).

The Commission, in its said report, held: That the 20 cent rate complained of was not found to be unreasonable for the future over either of the routes involved; that it was not found to have been unreasonable in the past as applied to such

shipments as moved over the second of the routes named above (via Baton Rouge, the *shorter* route), and that it was not found to have been unreasonable as applied to shipments which moved over the first of the routes named (via Shreveport, the *longer* route) subsequent to May 14, 1913 (the date when the intermediate rate from stations on the V. S. & P. in Louisiana to Port Arthur was increased from 13 cents to 17 cents per 100 pounds); but that it was found to have been unreasonable as applied to all shipments which moved over the route via Shreveport, the *longer* route, prior to said date. It was accordingly held that complainant was entitled to reparation on all such shipments, made over the *longer* route, via Shreveport, during the period from two years prior to the date of the filing of the complaint before the Interstate Commerce Commission up to May 14, 1913 (Rec., pages 41-44).

A rehearing was subsequently had at which additional evidence was introduced and the Commission affirmed its original findings (Anderson-Tully Company vs. Alabama & Vicksburg Ry., 39 I. C. C., 734). A supplemental hearing was had by the Commission upon its own motion for the particular purpose of establishing the identity of the commodity shipped during the period covered by the order of reparation (Anderson-Tully Company vs. Alabama & Vicksburg Ry., 50 I. C. C., 353).

The Commission, on July 8, 1918, awarded reparation against the defendants in the sum of $4,906.48 with interest at the rate of 6% per annum from March 14, 1912 (Rec., page 9). The defendants having refused to pay this award of reparation, the complainant brought suit in the District Court of the United States for the West-

ern Division of the Southern District of Mississippi, at the City of Vicksburg, on December 2, 1918 (Rec., page 12).

With regard to the question of jurisdiction, as appears from the record (Rec., pages 19-20), and as the Court judicially knows, the railroads, at the time when the above suit was brought, were in the possession and control and were being operated by the Director General of Railroads. The marshals' returns recite that summons in the above suit was served on Austin King, Freight Agent for the V. S. & P. R. R. Co., Vicksburg, Mississippi, and upon A. M. Calhoun, as Assistant to the Federal Manager of The Kansas City Southern Railway at Kansas City, Missouri. It was alleged, in the plea to the jurisdiction, that the persons named were not agents of either of the said defendants (Rec., page 16).

Assuming that the venue of the suit was governed by Section 16 of the Act to Regulate Commerce, which was denied by defendants, it was further contended by defendants that none of the defendants was subject to be sued at Vicksburg, Mississippi, especially during the period of Federal control when their properties were being operated by the Director General.

Plaintiff had alleged, as showing jurisdiction, that the Vicksburg, Shreveport & Pacific operated a part of its road in Warren County, Mississippi (Rec., page 2). The rails of the V. S. & P. Railway extend westward from Delta Point, Louisiana (which is just across the Mississippi River from Vicksburg, Mississippi) to Shreveport, a distance of 170 miles. That company has no rails east of the Mississippi River. The train crews and motive power stop at Delta Point. The trains from that point are taken across the river by means of

a ferry owned and operated by another railroad and reach the City of Vicksburg over the rails of the Alabama & Vicksburg Railway, being drawn by the locomotives and operated by the train crews of that railroad (Rec., page 19). All the parties to the present suit are corporations, and none is incorporated under the laws of the State of Mississippi, where the suit was brought (Rec., page 2). At this time, the railroads of these companies were under Federal control (Rec., page 19). Defendants challenged the jurisdiction of the Court below by a timely plea and the action of the Court in overruling their objections in this behalf is, as stated, one of the questions presented (Rec., pages 16-18).

On the 6th day of January, 1919, the defendants appeared specially by their counsel for the purpose of submitting their pleas to the jurisdiction of the Court (Rec., page 34). The Court overruled the pleas to the jurisdiction, and defendants duly excepted, and thereupon filed an answer and the trial of the case was proceeded with on the same day (Rec., page 35).

The cause was tried by the Court without the intervention of a jury and without the assistance of a stenographer, the parties having, by stipulation, waived the one and having, by necessity, dispensed with the other. As a result of this latter deprivation, when it came to the settling of the bill of exceptions, there was some dispute as to what had actually transpired at the trial. There having been no outsiders in attendance whose aid could be invoked in that behalf, the sole reliance of defendants in the preservation of a record in the proceedings at the trial was the memory of the trial judge. The bill of exceptions as presented here represents the result of their best efforts in this behalf.

It does appear, however, from the bill of exceptions that:

> "Counsel for the defendant then further objected to the admission of the award on the ground that it was incompetent to admit a part of the record without admitting the entire record of the Interstate Commerce Commission, and counsel for the plaintiff stated that he had no objection to the entire record going in; that if counsel for the defendant desired, the whole record might go in, and counsel for the defendant agreed for the whole record to go in. Counsel for the plaintiff then placed on the table what he said was a copy of the record of the Interstate Commerce Commission and the Court understood that the entire record was to be 'Considered in'" (Rec., page 36).

This is mentioned for the reason that the attorney for the plaintiff questioned defendants' right even to the meager bill of exceptions which appears in the transcript.

The lower court rendered judgment against the defendants for the sum of $6,910.56, being the amount of the award with interest to date of judgment, and further allowed an attorney's fee of $691.05 (Rec., page 31).

A motion for a new trial was filed on behalf of defendants. It was overruled and exceptions saved (Rec., pages 32-33).

Writ of error was taken to the United States Circuit Court of Appeals for the Fifth Circuit, where, on December 3, 1919, judgment was entered affirming the judgment of the lower court (Rec., pages 75-85).

A petition for rehearing (Rec., page 80) was filed by the defendants and denied (Rec., page 92)

and a writ of error sued out to the Supreme Court of the United States (Rec., pages 92-99).

The assignments of error filed in the Circuit Court of Appeals (Rec., page 93) raised substantially three questions: (a) Did the United States District Court for the Western Division of the Southern District of Mississippi acquire jurisdiction over the defendants? (b) Did the plaintiff's petition state a cause of action? (c) Were the facts found by the Interstate Commerce Commission sufficient to support a judgment for plaintiff?

Defendants' specification of errors in detail, is as follows:

Specification of Errors.

I.

The Circuit Court of Appeals erred in sustaining the action of the District Court in overruling defendant's pleas to the jurisdiction.

II.

The Circuit Court of Appeals erred in holding that the venue of the case was governed by amended section 16 of the Interstate Commerce Act, and not by the venue provision of the Act of Congress approved October 22, 1913.

III.

The Circuit Court of Appeals erred in holding that the road of the defendant, Vicksburg, Shreveport & Pacific Railway Company, ran in Warren County, Mississippi, within the meaning of said amended section 16.

IV.

The Circuit Court of Appeals erred in holding that the attempted service of summons upon said defendants, by delivering copies of said summons to agents of the Director General of Railroads, constituted valid service.

V.

The Circuit Court of Appeals erred in failing to hold that plaintiff's petition does not state facts sufficient to constitute a cause of action against defendants, or any of them.

VI.

The Circuit Court of Appeals erred in failing to hold that the facts found by the Interstate Commerce Commission were insufficient to sustain a recovery by plaintiff.

VII.

The Circuit Court of Appeals erred in failing to hold that the District Court committed error in declaring the law to be that it could not inquire into or rule upon sufficiency of the findings of fact of the Interstate Commerce Commission to warrant a recovery by plaintiff.

VIII.

The Circuit Court of Appeals erred in failing to hold that the District Court committed error in rendering judgment for plaintiff upon the findings of fact made by the Interstate Commerce Com-

mission, which were wholly insufficient to support a judgment for plaintiff, and the Circuit Court of Appeals, because of such insufficiency erred in affirming such judgment.

ARGUMENT.

I.

The Court below was without jurisdiction of the parties to this case and defendants' motion to dismiss on this ground should have been sustained.

(a) The venue of this case was governed by the venue provision of the Act of Congress, approved October 22, 1913, and not by amended Section 16 of the Interstate Commerce Act.

The question of jurisdiction is presented in a double aspect. The first inquiry is as to what statutory provisions are applicable, and the other is as to whether or not the facts bring defendants within the provisions of the applicable statute.

Plaintiff contends that Section 16 of the Act to Regulate Commerce, as amended in 1910, governs the jurisdiction of the lower court. It provides that suit upon a reparation order of the Commission may be brought by the party in interest "in the Circuit Court (now District Court) of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties." It is further provided that where there is more than one

defendant, as in the present case, the suit may be brought in any district where it might be brought against any one of them under the foregoing provision.

Plaintiff contends that such provision, as so amended, governs the venue in this case, and also that the "road" of one of the defendants, the Vicksburg, Shreveport & Pacific, runs through the district where suit was brought, so that the lower court was correct in taking and retaining jurisdiction of the case.

Defendants, on the other hand, claim that the foregoing provision has no application to this controversy, and that, even if it does, none of the defendants comes within the jurisdiction thus established.

In support of their first contention defendants point to the Act of October 22, 1913, which, so far as pertinent to the questions here presented, provides:

> The venue of any suit hereafter brought to *enforce*, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made.

If this provision does govern, then there is no question that the court below had no jurisdiction to try this case, over defendants' objections, inasmuch as it is shown by the petition that plaintiff is a Michigan corporation.

A brief review, which is given below, of the statutory provisions determining the venue of suits

affecting orders made by the Commission will, it is believed, be helpful.

The Act of February 4, 1887, Section 16, as originally enacted (24 Stat. at L. 384), provided that when any carrier should violate or refuse or neglect to obey any lawful order or requirement of the Commission, suit might be brought by the Commission, or any interested person, in the Circuit Court of the United States "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen."

Section 16 was amended by the Act of March 2, 1889, and there provision was made for the enforcement of the lawful orders of the Commission in cases requiring a trial by jury, and also in cases in which no jury was required. In either case, the venue is "the Circuit Court of the United States in the judicial district in which the common carrier complained of has its principal office or in which the violation or disobedience of such order or requirement shall happen."

The next amendment to Section 16 was by the Act of June 29, 1906, commonly called the Hepburn Act (34 Stat. at L. 590). By this amendment actions relating to orders of the Commission are divided into three classes—actions to enforce orders for the payment of money, actions to enforce orders other than for the payment of money, and a new provision providing for actions against the Commission to enjoin, set aside, annul or suspend any of its orders. There are separate statutory provisions for the venue in each of the three classes of actions, as follows:

(a) Suits against a carrier to enforce *orders for the payment of money* might be brought "in the

Circuit Court of the United States for the district in which he (the plaintiff) resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs."

(b) Suits against a carrier for the enforcement of any order *other than for the payment of money* might be brought "in the Circuit Court in the district where such carrier has its principal operating office, or in which the violation or disobedience of said order shall happen."

(c) The venue of suits brought in the Circuit Court against the Interstate Commerce Commission to *enjoin, set aside, annul, or suspend* any order or requirement of the Commission "shall be in the district where the carrier against whom such order or requirement shall have been made has its principal operating office."

From the effective date of the Act of June 29, 1906, until the organization of the Commerce Court by the Act of June 18, 1910 (63 Stat. at L. 539), jurisdiction with respect to all orders made by the Commission, whether to enforce the order or to enjoin, suspend, or set it aside, remained vested in the Circuit Court of the United States. The appropriate provisions for the venue of each of such actions depended upon the nature of the order and the character of the action.

In the creation of the Commerce Court the jurisdiction over orders of the Commission theretofore vested in the Circuit Courts of the United States was divided as between these courts and the newly created court. The latter was vested with jurisdiction of actions for (a) the enforcement of any order of the Commission other than for the payment of money, and also (b) actions

brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Commission. The jurisdiction to enforce orders for the payment of money was left to the Circuit Courts of the United States (which by the Act of October 3, 1911, became district courts), and also to state courts with general jurisdiction. The venue of actions over which the Commerce Court was given jurisdiction was, of course, exclusively in that court, and the venue of actions in the Circuit Courts of the United States, to enforce orders for the payment of money only, was in "the district in which he (the plaintiff) resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, and also in any state court of general jurisdiction having jurisdiction of the parties." Section 16 was amended in 1910 to conform to these changes.

As the law stood, therefore, after the creation of the Commerce Court in 1910, an action brought against the carrier to enforce an order of reparation made by the Commission, could be brought in the Circuit (afterwards the District) Court of the United States in the district in which the plaintiff resided, or in which the principal operating office of the carrier was located or through which the road of the carrier ran, or, if brought in the state court, in any court of general jurisdiction having jurisdiction of the parties.

But by the Act of October 22, 1913 (38 Stat. at L. 219), the Commerce Court was abolished and there occurred a rearrangement of jurisdiction to *enforce,* as well as to set aside orders of the Commission, and a rearrangement of the venue of such actions. This Act was virtually an amendment of the Act to Regulate Commerce and particularly of Section 16 as amended in 1906.

The jurisdiction formerly vested in the Commerce Court is, by the Act of October 22, 1913, "transferred to and vested in the several District Courts of the United States." The District Courts, therefore, by this Act became vested, or rather reinvested, with full and complete jurisdiction for the enforcement, as well as for the annulment of *all* orders of the Commission. The jurisdiction, in this respect, vested in them by the Act of June 29, 1906, above referred to, is wholly restored.

But the venue of actions for the enforcement or annulment of orders of the Commission, as it existed under the Act of 1906, is not restored by the Act of October 22, 1913. On the contrary, Congress in that Act determined to substitute one comprehensive venue provision to apply to all litigation concerning orders of the Commission relating to transportation in place of the separate provisions for each of the three forms of action.

By the Act of June 29, 1906, it will be remembered, there were different provisions for the venue of actions, depending upon whether they were for the enforcement of orders for the payment of money, for the enforcement of orders other than for the payment of money, or for the setting aside or annulment of the Commission's orders. *The intention of Congress is plainly manifested in the Act of October 22, 1913, to abolish these confusing and perhaps conflicting provisions for the venue of actions affecting orders of the Commission, regardless of the nature of the order.*

And so we find in the Act of October 22, 1913, the provision that in *any* action thereafter brought affecting *any* order made by the Commission, whether to enforce the order or to suspend, or annul it, the venue shall be in the judicial district of the residence of the party, or any of the parties

upon whose petition the order in question was made, with certain exceptions with which we are not now concerned. The venue provision in its entirety is as follows:

> The venue of *any* suit hereafter brought to enforce, suspend, or set aside, in whole or in part, *any* order of the Interstate Commerce Commission, shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party, the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning the final destination of such shipment.

Every order of the Commission which may be the basis of litigation is included. There is a clear intention to provide for *all*. None is excluded.

The Act does not say that the new venue provision applies to "any action to enforce any order of the Commission *other than an order for the payment of money*," as it would have done if it had been intended to leave the venue provision of

amended Section 16 in force. *Any* suit thereafter brought to enforce *any* order of the Interstate Commerce Commission comes within its expressed terms. This by its plain language includes an action to *enforce* an order of reparation, such as is involved in the present case. There is a manifest intention to deal with *all* orders of the Commission, whether for the payment of money, or otherwise, and whether the action be for their enforcement or their annulment. Congress was dealing with and revising the entire subject matter of venue in actions affecting orders made by the Commission. It determined that there should be one uniform rule governing all such actions. Could it have used more explicit language to accomplish that purpose?

It will not do to say that no part of amended Section 16 is *specifically* repealed by the Act of 1913, and hence all its provisions, including the provision for the venue of actions to enforce orders of the Commission for the payment of money, remain in full force. One part of amended Section 16 provides that if any carrier fails to obey an order of the Commission, other than for the payment of money, the injured party, or the United States, may apply to the Commerce Court for the enforcement of the order. But the Commerce Court is abolished and hence, of necessity, amended Section 16 in this respect is clearly repealed by implication. There is, therefore, a manifest intent on the part of Congress to repeal *some* of the provisions of this section, and why not the provision concerning the venue of actions to enforce orders of the Commission for the payment of money? It is respectfully submitted that the venue provision in amended Section 16 of the Act to Regulate Commerce relied on by plaintiff is in

plain conflict with the Act of 1913, and is repealed.

The language of the Act of 1913, specifying the venue of any action to enforce any order of the Commission, must be given some force and effect to carry out the intention of Congress. What meaning can be given to its plain and unambiguous terms except that *any* suit to enforce *any* order of reparation must be brought in the district of the residence of at least one of the parties upon whose petition the order of reparation was made? If it does not mean that, it is entirely meaningless, and is no more than a jumble of words.

In this case the plaintiff, Anderson-Tully Company, is a Michigan corporation, and the district of its residence is in that state (*Shaw* vs. *Quincy Mining Co.*, 145 U. S., 445; Elliott on Railroads, Sec. 24; *United States* vs. *Northern R. R. Co.*, 134 Fed., 715; *In re Keasby & Co.*, 160 U. S., 221; *Ellsworth Trust Co.* vs. *Paramon*, 108 Fed., 906), and hence the District Court in that state alone has jurisdiction of an action to enforce the award.

It is a well settled rule of law that where Congress takes up an entire subject-matter and covers it by appropriate legislation, this operates as a repeal of prior provisions upon the same subject. This is illustrated in the case of *Tracy* vs. *Tuffly*, 134 U. S., 206, where the Court said:

> And while it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, *if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern.* *United State* vs. *Tynen*, 78 U. S., 11 Wall., 88, 95 (20:153, 155); *Cook County Nat. Bank* vs.

United States, 107 U. S., 445, 451 (27: 537, 538).

Here the subject matter was the venue of all actions affecting orders of the Commission, either to enforce them or to set them aside. The whole subject was evidently up for consideration by Congress. The district courts were to be reinvested with full jurisdiction over all actions of this nature. Prior statutes contained different and conflicting provisions concerning the venue of such actions—conflicting in the sense, as appears from authorities presently to be cited, that difficulty was likely to arise in determining whether the action which affected an order of the Commission was one to enforce it or to set aside or suspend it. It was evidently the purpose of Congress to establish *one uniform rule* governing the venue of all such actions and to repeal all prior provisions upon the subject. Hence it provided, in substance, that:

> The venue of *any* suit thereafter brought to *enforce*, suspend or set aside *any* order of the Commission shall be in the district of the residence of the party upon whose petition the order was made.

No more comprehensive or emphatic language could have been employed. It evidences an intention upon the part of Congress to supersede all prior provisions upon the subject to the end that there might be established one uniform rule upon the subject.

The situation before Congress at the time of the passage of the Act of October 22, 1913, was somewhat similar to that confronting it at the time of the passage of the Act of March 3, 1891, estab-

lishing the Circuit Court of Appeals and creating a new and complete scheme of appellate jurisdiction. It is held in *Paquete Habana*, 175 U. S., 677, that the latter Act operated to repeal by implication all prior acts upon the subject, including those imposing pecuniary limits upon appellate jurisdiction. The court said:

> Section 14 of the Act of 1891, after specifically repealing Section 691 of the Revised Statutes and Section 3 of the Act of February 16, 1875, further provides that "all Acts and parts of Acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of this Act, are hereby repealed." 26 Stat. at L. 829, 830. The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the Acts referred to. *McLish* vs. *Roff*, 141 U. S., 661, 667, 35 L. Ed., 893, 895, 12 Sup. Ct. Rep., 118. And, although neither Section 692 nor Section 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the Act, the case comes within the reason of the decision in an analogous case, in which this court said: "The provisions relating to the subject matter under consideration are, however, *so comprehensive, as well as so variant from those of former Acts*, that we think the intention to substitute the one for the other is necessarily to be inferred, and must prevail." *Fisk* vs. *Henarie*, 142 U. S., 459, 468, 35 L. Ed., 1079, 1083, 12 Sup Ct. Rep., 207.

The decision in this court in the recent case of *United States* vs. *Rider*, 163 U. S., 132, 41 L. Ed., 101, 16 Sup. Ct. Rep., 983, affords an important, if not controlling, precedent. From the beginning of this century until the passage of the Act of 1891, both in civil and in criminal cases, questions of law upon which two judges of the circuit court were divided in opinion might be certified by them to this court for decision. Act of April 29, 1802, Chap. 31, Sec. 6, 2 Stat. at L. 159; June 1, 1872, Chap. 255, Sec. 1; 17 Stat. at L. 196; Rev. Stat. Secs. 650, 652, 693, 697; *New England M. Ins. Co.* vs. *Dunham*, 11 Wal., 1, 21, 20 L. Ed., 90, 96; *United States* vs. *Sanges*, 144 U. S., 310, 320, 36 L. Ed., 445, 449, 12 Sup. Ct. Rep., 609. But in *United States* vs. *Rider* it was adjudged by this court that the Act of 1891 had superseded and repealed the earlier Acts authorizing questions of law to be certified from the circuit court to this court; and the grounds of that adjudication sufficiently appear by the statement of the effect of the Act of 1891 in two passages of that opinion: "Appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit courts of appeals and in all civil cases by appeal or error, without regard to the amount in controversy, except as to appeals or writs of error to or from the circuit courts of appeals in cases not made final as specified in Section 6." "It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the Act of March 3, 1891, covers the whole subject mat-

ter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate." 163 U. S., 138-140, 41 L. Ed., 104, 16 Sup. Ct. Rep., 986. * * *

As was long ago said by Chief Justice Marshall, "the spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the Legislature to effect a certain object, some degree of implication may be called in to aid that intent." *Durousseau* vs. *United States*, 6 Cranch, 307, 314, 3 L. Ed., 232, 234. And it is a well settled rule in the construction of statutes, often affirmed and applied by this court, that, "even where two Acts are not in express terms repugnant, yet if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act." *United States* vs. *Tynen*, 11 Wall., 88, 92, 20 L. Ed., 153, 154; *King* vs. *Cornell*, 106 U. S., 395, 396, 27 L. Ed., 60, 1 Sup. Ct. Rep., 312; *Tracy* vs. *Tuffly*, 134 U. S., 206, 223, 33 L. Ed., 879, 884, 10 Sup. Ct. Rep., 527; *Fisk* vs. *Henarie*, 142 U. S., 459, 486, 35 L. Ed., 1079, 1083, 12 Sup. Ct. Rep., 297; *District of Columbia* vs. *Hutton*, 132 U. S., 18, 27, 36 L. Ed., 60, 62, 12 Sup. Ct. Rep., 369; *United States* vs. *Healey*, 160 U. S., 146, 147, 40 L. Ed., 369, 373, 16 Sup. Ct. Rep., 247.

We are of opinion that the Act of 1891, upon its face, read in the light of settled rules of statutory construction and of the decisions of this court, clearly manifests the intention of Con-

> gress to cover the whole subject of the appellate jurisdiction from the district and circuit courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier Acts of Congress, including those that imposed pecuniary limits upon such jurisdiction, and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case.

In the case just cited the subject matter was appellate jurisdiction, just as in the instant case the subject matter was the venue of actions affecting orders of the Commission, and just as the comprehensive Act of 1891 operated to repeal by implication all prior Acts upon the same subject, so should the comprehensive Act of 1913 be held to repeal by implication all prior Acts upon the same subject.

In *District of Columbia* vs. *Hutton*, 143 U. S., 18, it was held that Section 354 of the Revised Statutes of the United States relating to the District of Columbia, prescribing that no person shall be appointed as policeman or watchman who has not served in the army or navy of the United States and received an honorable discharge, was repealed by the Act of 1878, entitled "An Act Providing a Permanent Form of Government of the District of Columbia," which provided that the commissioners of the District should have authority to employ such officers and agents as might be necessary to carry into execution the powers and duties devolving upon them. The Court said:

Under this view of the object and purposes of the Act of 1878, we think the Court below was correct in holding that that Act superseded and repealed by implication Section 354 of the Revised Statutes relating to the District of Columbia. It is true there are no express words of repeal in the Act of 1878 applied to said Section 354. But the whole tenor of the Act shows that it was intended to supersede previous laws relating to the same subject matter, and to provide a system of government for the District complete in itself, in all respects. The language of the sixth section of the Act of 1878, that the commissioners "shall have authority to employ such officers and agents, and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this Act," clearly implies, we think, that, in the employment of officers over whom they are given control, they may select such persons, under appropriate regulations, as they may deem suitable and competent for the discharge of the duties pertaining to such offices, without regard to their possessing the qualifications prescribed by said Section 354. * * *

We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this Court in *United States* vs. *Tynen*, 78 U. S., 11 Wall., 88, 92 (20:153, 154), it is this: "When there are two Acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter Act, without any repealing clause,

> operates to the extent of the repugnancy as a repeal of the first; and even where two Acts are not in express terms repugnant, yet if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act." See also *Murdock* vs. *Memphis*, 87 U. S., 20 Wall., 590, 617 (22:429, 437); *Tracy* vs. *Tuffly*, 134 U. S., 206, 223 (33:878, 884); *Fisk* vs. *Henarie*, 142 U. S., 459 (35:1080).

In *King* vs. *Cornell*, 106 U. S., 395, it was held that the second subdivision of Section 639 of the Revised Statutes, permitting aliens to remove causes from state to federal courts, was repealed by the Act of 1875. The court said:

> Congress then, as it seems to us, manifested its intention to exclude aliens from the privileges of such removal, just as it did in 1867, in cases of local prejudice. *The whole subject was evidently up for consideration.* The first and second subdivisions of Section 639 were thoroughly revised and radically modified. There cannot be a shadow of doubt that, except as to aliens in the second subdivision, both these subdivisions were repealed, and we cannot believe if Congress had intended to continue in force that part of the second subdivision which allowed an alien defendant to remove a cause, so far as it related to him, and gave his adversary no corresponding right, it would have been left to inference alone. So thorough a revision implies, as we think, an intention *to make the new law a substitute for all that those subdivisions contained.*

In *Fisk* vs. *Henaire*, 142 U. S., 459, it was held that the Act of 1867 in regard to the removal of causes, and Revised Statutes 639 on the same subject, were repealed by the Act of 1887. The court said:

> The Act of March 3, 1887, and also as corrected by the Act of August 13, 1888 (25 Stat. at L., 435), provided that "any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause."
>
> In view of the repeated decisions of this court in exposition of the Acts of 1866, 1867 and 1875, it is not to be doubted that Congress, recognizing the interpretation placed on the word "final," in the connection in which it was used in prior Acts, and the settled construction of the Acts of 1875, deliberately changed the language, "at any time before the final hearing or trial of the suit," or "at any time before the trial or final hearing of the cause," to read: "at any time before the trial thereof," as in the Act of 1875, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof.
>
> The attempt was manifestly to restrain the volume of litigation pouring into the federal courts, and to return to the standard of the Ju

diciary Act, and to effect this in part by restoring to the language used in the Act of 1875, as its meaning had been determined by judicial interpretation. This is the more obvious in view of the fact that the Act of March 3, 1887, was evidently intended to restrict the jurisdiction of the circuit courts, as we have heretofore held. *Smith* vs. *Lyon*, 133 U. S., 315 (35:635): *Re Pennsylvania Co.*, 137 U. S., 451 (34:738).

We deem it proper to add that we are of opinion that the Act of 1867, or subdivision third of Section 639, was repealed by the Act of 1887.

The *subject matter* of the former Acts is *substantially covered* by the latter, and the differences are such as to render the intention of Congress in this regard entirely clear.

Under the previous Acts the right of removal might be exercised by plaintiff as well as defendant; the application was addressed to the state court; there was no provision for the separation of the suit; the ground of removal was based upon what the affiant asserted he had reason to believe and believed; and action on the motion to remand could be reviewed on appeal or writ of error or by mandamus, while under the latter Act the right is confined to the defendant; the application is made to the circuit court; the suit may be divided and remanded in part; the prejudice or local influence must be made to appear to the circuit court, that is, the circuit court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that, by reason of those causes, the defendant will not be able to obtain justice in

the state courts; and review on writ of error or appeal, or by mandamus, is taken away. *Re Pennsylvania Co.*, 137 U. S., 451 (34: 738); *Malone* vs. *Richmond & D. R. Co.*, 35 Fed. Rep. 625.

The repealing clause in the Act of 1887 does not specifically refer to these prior Acts, but declares that "all laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby, repealed." The provisions relating to the subject matter under consideration are, however, so *comprehensive*, as well as so *variant* from those of the former Acts, that we think the intention to *substitute* the one for the other is necessarily to be inferred and must prevail.

In *King* vs. *Cornell*, 106 U. S. 395, 396 (27: 60), it was held that subdivision second of Section 639 was repealed by the Act of 1895, the repealing clause in which was the same as here, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "While repeals by implications are not favored, it is well settled that where two Acts are not in all respects repugnant, if the later Act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." The rule thus expressed is applicable, and is decisive.

The conclusion seems irresistible that when the Act of 1913 was passed there were various confusing and conflicting provisions covering the venue of actions affecting orders of the Commission, and Congress gave consideration to the entire subject matter and decided to substitute for the provisions

then in force one comprehensive scheme covering the entire subject matter. Accordingly, it enacted that *any* action thereafter brought to *enforce*, suspend or set aside *any* order of the Commission affecting transportation, should be brought in the district of the residence of the party upon whose petition the order was made.

The opinion of the Court in the case of *St. Louis Southwestern* vs. *Samuels*, 211 Fed. 588, is interesting as indicating a view of this question in harmony with our contention. There an action had been brought in the Federal district court to enforce an award of reparation. The question was whether the case was controlled by amended Section 16 above quoted, or by Section 51 of the Judicial Code, the Act of October 22, 1913, not having been passed at the time. It was held that the provisions of Section 16 governed, as it was a specific act, rather than the general provision of the Judicial Code, the Court, however, saying in substance that:

> The intention of Congress in regard to venue in cases of this kind (actions to enforce reparation orders) is shown by the following from the late Act of Congress. (Quoting the venue provision of the Act of October 22, 1913).
>
> The court said:
>
> "Section 51 of the Judicial Code deals generally with venue in the district courts in the cases in which jurisdiction is given by the Code and it is not to be presumed that it was intended to restrict jurisdiction or affect the venue in other acts of Congress not enumerated, wherein jurisdiction is specially granted and the venue fixed.
>
> Counsel for defendant in error well says in his brief:

'Clearly the Legislature did not intend to cover this legislation upon a particular subject by the enactment of the general law. The real reason which doubtless actuated Congress to confer jurisdiction upon the circuit court of the district in which the complainants reside was to provide a means for a shipper to enforce the reparation order for a small amount, as in this case, without having to go 1,000 miles and incur an expense in excess of the amount of the award.

The legislative body must have known that, in the great majority of cases, orders of reparation would not be for large sums, and that in each instance shippers would start in with a handicap in that the transportation company with its regularly retained corps of attorneys, its free transportation facilities for them, and its witnesses, together with its vast wealth and power, would be able, by declining to pay an order of the Commission, practically to defeat such order, unless the shipper could be brought near enough to a forum where he could enforce such order without being compelled to expend more than the reparation allowed.'

The intention of Congress in regard to venue *in cases of this kind* is shown by the following from the late Act of Congress abolishing the Commerce Court, and transferring jurisdiction to the district court, approved October 22, 1913:

'The venue of any suit hereafter brought to enforce, suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, ex

cept that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.'"

The case of *McLean Lumber Co.* vs. *United States*, 237 Fed., 460 (Warrington, circuit judge, and McCall and Sanford, district judges), being a suit seeking to enjoin an order fixing rates, is nevertheless instructive as containing a specific declaraton that the *Act of October* 22, 1913, *operated as a direct amendment of amended Section* 16. We quote from the opinion as follows:

There is no want of jurisdiction in the court to hear and determine the petition on the ground that it does not appear that the railroad company has its principal operating office in this district. Act of Oct. 22, 1913, c. 32, 38 Stat. 219, 221 (Comp. St. 1913, Sec. 994) abolishing the Commerce Court and vesting its jurisdiction in the several district courts of the United States, *superseded the former provision as to venue contained in Section* 16 *of the Interstate Commerce Act* (Act Fed. 4, 1887, c. 104, 24 Stat., 379, as amended by Section 5 of Act June 29, 1906, c. 3591) 34 Stat.

584, 592 (Comp. St. 1913, Sec. 8584), and provided that:

"The venue of any suit hereafter brought to enforce, suspend or set aside any order of the Commission shall be in the jurisdictional district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition, before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office."

Three of the petitioners, upon whose complaint the hearing was had before the Commission resulting in the orders in question, are residents of this district, and the fourth has its principal office herein. Obviously, therefore, whether the orders in question be regarded as made upon their petition, or as not relating to transportation, or as not made on the petition of any party, there is, in either alternative, venue in this district, under the express terms of the Act.

In the case of *Illinois Central* vs. *Public Utilities Commission*, 245 U. S., 493, 38 S. C. R., 170, it is said:

The questions to which attention is first invited relate to the power of the District

Court in the Northern District of Illinois to entertain the suits and the cross-bills in view of the jurisdictional provision in the Act of October 22, 1913, c. 32, 38 Stat. 219, that a suit "to enforce, suspend or set aside, in whole or in part," an order of the Commission relating to transportation and made upon petition may be brought only in the district "wherein is the residence of the party or any of the parties upon whose petition the order was made."

It was objected in the District Court that the suits were brought to enforce the Commission's order, and therefore could be entertained only in the eastern district of Missouri, which embraces the residence of the party upon whose petition the order was made. But the Court sustained its jurisdiction, ruling that the suits were not of the nature indicated by the objection.

In common acceptance a suit to enforce an order of the Commission is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command. Nothing in the jurisdictional provision suggests that this is not what is intended, and that it is shown by the provision in Section 1 of the Act to Regulate Commerce, as amended by Act June 18, 1910, c. 309, 36 Stat. 554, that, if an order respecting transportation be not obeyed by the carrier, the same may be enforced at the suit of the Commission, an injured party, or the United States, by an appropriate writ of process restraining the carrier from further disobedience and enjoining upon it due compliance with the order. A reading of both provisions leaves no room to

doubt that the suit to enforce so clearly outlined in one is the suit intended by the other.

In *Skinner & Eddy Corporation* vs. *United States,* 39 Sup. Ct. Rep., 375, an action was brought in the District Court of the United States for the District of Oregon by the Skinner-Eddy Corporation to enjoin an increase in carload rates on iron and steel products from Pittsburgh to Seattle, the United States, the Commission and sixteen railroads being joined as defendants. It was objected that the proper venue of this action was not in the district of Oregon. The Court sustained the jurisdiction on the ground that one of the parties to the action in whose behalf the order was made was a resident of Oregon, saying:

> The defendants contend also that if the subject matter was within the jurisdiction of a District Court of the United States, it was not within that of Oregon. The objection is based upon Act Oct. 22, 1913, c. 32, 38, Stat. 208, 219 (Comp. St. Sec. 994), which declares:
>
> "The venue of any suit hereafter brought to enforce, suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made."
>
> And it is asserted that the parties upon whose petition the order was made are the Merchants' Association of Spokane, a resident of the eastern district of Washington, and the Railroad Commission of Nevada, a resident of the district of Nevada. The applications of these parties, filed in March, 1916, were

doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original application of carriers for relief under the fourth section. The report and the order are entitled, "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the Oregon-Washington Railroad & Navigation Company; and, as it was joined as defendant in the suit, the District Court of Oregon had jurisdiction over the parties.

On this point, the Circuit Court of Appeals, in its opinion, in this case (Rec., pages 77-78), said:

> The plaintiff in error contends that Section 16 has been repealed by implication by the Act of October 22nd, 1913, which abolished the Commerce Court, and which provided that "the venue of any suit to enforce, suspend, or set aside, in *whole* or in part, any order of the Interstate Commerce Commission, shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." The purpose of the Act of October 22nd, 1913, was to abolish the Commerce Court and to redistribute its jurisdiction. The Act of October 22nd, 1913, provides that "the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several District Courts of the United States, and all acts or parts of acts, in so far as they relate to the

establishment of the Commerce Court are repealed." The Commerce Court was never vested with jurisdiction to enforce awards of money reparation made by the Interstate Commerce Commission in favor of shippers. Legislation, the design of which was only to abolish the Commerce Court, should not be held to change by implication a procedure that related exclusively to Courts other than the Commerce Court. The venue fixed by the Act of October 22nd, 1913, of suits brought to enforce, suspend or set aside orders of the Interstate Commerce Commission, is limited to suits to enforce, suspend or set aside orders of the Commission which the Commerce Court had been vested with jurisdiction of, and which did not include reparation order suits. The limitation as to venue should be held to apply only to the class of cases jurisdiction of which was transferred from the Commerce Court to the District Courts by the terms of the Act of October 22nd, 1913.

The Act of October 22, 1913, did, however, repeal by implication certain portions of amended Section 16 of the Interstate Commerce Act, and this fact taken in connection with the express language of the venue provision indicates the intention of Congress, in restoring jurisdiction over orders of the Interstate Commerce Commission to the District Court, to enact a comprehensive law covering the venue of all actions affecting such orders, whether to enforce them or to set them aside.

Notwithstanding the fact that the Act abolishing the Commerce Court contains the provision that "all Acts or parts of Acts in so far as they

relate to the establishment of the Commerce Court are repealed," the effect of the Act beyond question is to repeal the following paragraph of amended Section 16 of the Interstate Commerce Act:

> If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The intention of Congress, therefore, to repeal a part of amended Section 16 is plain and unmistakable, and yet this is not a matter which relates "to the establishment of the Commerce Court."

The intention of Congress to repeal a part of amended Section 16 being thus manifested, there is no reason to suppose that Congress intended the amendment of Section 16 to be limited to the subject matter above quoted. Had such been its intention, the venue provision would have contained language specifically excluding actions for the payment of money and would have read thus:

> The venue of any suit hereafter brought to enforce, suspend or set aside in whole or in part any order of the Interstate Commerce Commission (except an order for the payment of money), shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made.

But Congress excluded from the venue provision the language in parenthesis, "except orders for the payment of money," and this is the strongest evidence of the intention of Congress that the venue provision should apply to the enforcement of all orders of the Commission, whether for the payment of money or otherwise.

It should be remembered, also, that Congress, when it abolished the Commerce Court, and restored to the District Courts jurisdiction of suits of which the Commerce Court had been vested with jurisdiction, did not re-enact the old venue provisions, but enacted a new venue provision sufficient to completely cover the subject.

Since it is apparent that Congress intended to amend a part of Section 16, is there any reason to suppose that it intended to limit the amendment to the subject matter in the first quotation above, and not to include the matter of venue, particularly when it employed language sufficiently broad and comprehensive to include by its express terms a modification of the venue provision in Section 16 concerning the enforcement of orders of the Commission for the payment of money?

(b) *If, however, amended Section* **16** *of the Act to Regulate Commerce does apply, the plea to the jurisdiction should nevertheless have been sustained, because the "road" of the Vicksburg, Shreveport & Pacific Railroad does not run through the southern district of Mississippi within the meaning of said amended Section* **16.**

With regard to this contention, the Circuit Court of Appeals, in its opinion (Rec., pages 76-77), said:

> The 16th Section of the Act to Regulate Commerce, approved February 4th, 1887, together with its various subsequent amendments, provided that if a carrier should not comply with an order of the Interstate Commerce Commission for the payment of money within the time set in the order, the plaintiff might sue for the enforcement of the order in any Circuit (District) Court of the United States in which he resided or in which was located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties. Jurisdiction was invoked by the plaintiff upon the theory that the road of the defendant, the Vicksburg, Shreveport & Pacific Railway Company, ran through the southern district of Mississippi. This was disputed by the defendants. The facts relating to it stipulated in the record, are as follows: The Vicksburg, Shreveport & Pacific Railway Company operated a line from Shreveport to Vicksburg, as a common carrier of passengers and freight. Its own rails stopped at Delta, La., across the Mississippi River from Vicksburg. Its trains

were transferred by ferry boat across the river. Its engines and engine crews went no further east than Delta. Its passenger coaches and train crews crossed the river to the terminal at Vicksburg. Its trains, after they had reached the east side of the river, were handled by the engines of the Alabama & Vicksburg Railroad Company between the transfer boat and the Vicksburg terminal and vice versa. It had an arrangement with the Alabama & Vicksburg Railroad Company for the handling of its trains by the engines and engine crews of the latter, and for a joint use with it of the Vicksburg terminal. It also had a contract with the corporation which handled the ferry boat for the handling of its cars over the river. In view of these facts, we think the instrumentality through which the business of the Vicksburg, Shreveport & Pacific Railroad Company, as a carrier, was conducted, viz., the transfer boat, the tracks and terminal of the A. & V. R. R. Co., were well held to be a part of the road of the Vicksburg, Shreveport & Pacific Company. Ownership of them was not essential and the word "road" includes other instruments than tracks. If the defendant, in order to conduct its business as a carrier of passengers, made use of instrumentalities, other than railroad track, and owned by others than defendant, but which it had the contractual right to use in its business, and which were located in the southern district of Mississippi; this was enough to show venue in the District Court of that district. The stipulation shows that such was the case.

The Court of Appeals' recital of the facts stated in the stipulation omits one very important point, namely, that at the time covered by the stipulation, the United States Government was in control of the railroads of the Vicksburg, Shreveport & Pacific Railway Company and the Alabama & Vicksburg Railway Company (Rec., pages 19-20).

If this suit had been brought prior to Federal control, we should contend that the intention of the statute is to permit a suit in any district where a carrier has its railroad tracks, which would naturally include operating officials and a legal department, since the carrier would then be in position to defend itself without extra inconvenience or expense. Perhaps, this would include a carrier, which, under lease or trackage rights, operates its trains with its own crews over the rails of another carrier, since in that situation, also, it would naturally have operating officials and representatives of its legal department in the district. Neither of those conditions is present here. From the west side of the Mississippi River to Vicksburg, Mississippi, these cars were handled by a ferry company and by engines and crews of the Alabama & Vicksburg Railroad, which was paid by the Vicksburg, Shreveport & Pacific Railroad for such service. In other words, the Vicksburg, Shreveport & Pacific Railroad does not itself operate trains with its own engines and crews into Vicksburg. The arrangement is more analogous to that where a through train is operated by arrangement between several connecting carriers, each carrier operating the train over its own rails.

During the period of Federal control, the case is even stronger, since as the Court judicially knows, the Vicksburg, Shreveport & Pacific Railroad cor-

poration had nothing to do with the control or operation of its railroad, the latter having been taken over by the Director General. During that period, the Vicksburg, Shreveport & Pacific Railroad corporation certainly had no connection with the road of the Alabama & Vicksburg Railroad between Vicksburg and the bank of the Mississippi River.

The names used to designate the railroads in the return and stipulation are not controlling. This is explained in the case of *Westbrook* vs. *Director General of Railroads*, 263 Fed., 211, where the Court, on pages 214 and 215, said:

> By an act of August 29, 1916 (Comp. St. Sec., 1974a), the President in time of war, was empowered to take possession and assume control of any system of transportation and utilize the same as stated in the act. No details were prescribed and no provision made for a name under which the government activity was to be exercised as was done in the case of the Alaska railroads by the first sentence of section 1 of the act of March 12, 1914 (38 Stat., 305 [Comp. St., Sec. 3593a]). By the proclamation of December 26, 1917 (Comp. St., Sec. 1974a), the President did "take possession and assume control of the systems of transportation," and committed the "possession, control, *operation* and utilization" of them to a Director General of Railroads providing that "said Director may perform the duties imposed upon him *so long and to such extent as he shall determine, through* the boards of directors, receivers, officers and employes of said systems of transportation," and until otherwise ordered, these

officers and employes were directed to "continue the operation thereof in the usual and ordinary course of business of common carriers *in the names* of their respective companies."

The effect of the President's action and this act was not to take over the corporate owners of the transportation systems or their franchises, but only their properties. Postal Telegraph Co. vs. Call, 255 Fed., 850—C. C. A. The persons who had been officers and employes of the owning companies ceased in general to be such and became agents and employes of the Director General. Service of process upon them no longer bound their former employers. Southern Cotton Oil Co. vs. A. C. L. R. R. Co. (D. C.), 257 Fed., 138; Wood vs. Clyde S. S. Co. (D. C.), 257 Fed. 879. The federal control was exclusive and complete. Northern Pacific Railroad Co. vs. North Dakota, 250 U. S., 135, 39 Sup. Ct., 502, 63 L. Ed., 897. Plainly, therefore, railroad operations became those of the United States, no matter in whose name carried on. They were for months carried on over each line of railroad *in the name of its owner*, but these names were *all aliases of the United States*. The *inevitable confusion* of *names* with *rights* occurred, and the Director General issued his General Orders 50 and 50a, directing suits to be brought against his official title, and providing, perhaps unnecessarily, for service on his agents.

Since the owning companies could no longer control, the railroad officials and employes were not their agents, and the companies could not be held for their acts. Brady vs. C. & G. W. R. R. Co., 114 Fed., 100, 105, 107, 52 C. C.

A., 48, 57 L. R. A., 712. The United States owned what was earned, and they alone could be treated as the business operator of each railroad.

(c) *The attempted service upon the Vicksburg, Shreveport & Pacific Railway Company by delivering a copy of the summons to the Freight Agent at Vicksburg, Mississippi, during Federal control, was not good service upon the corporation.*

With regard to this contention, the Circuit Court of Appeals, in its opinion (Rec., page 78), said:

> It is contended that the defendant, the Vicksburg, Shreveport & Pacific Railway Company, was not properly served. The return of the Marshal is that the summons was "executed by handing a true copy of this Summons and Petition for Judgment to Austin King, Freight Agent for the V. S. & P. R. R. Co., Vicksburg, Miss., Dec. 4, 1919." Plaintiff in error contends that the defendant railroad was then in Government operation and control, of which the Courts take judicial notice and hence, that the person served was an employe of the Government and not an agent of the carrier. The return is to the effect that, at the time of service, to whom the copy was handed, was an agent of the defendant railroad company. The return so long as its recital is unamended, is conclusive of the character of the person served. The fact that King was an employee of the Government would not necessarily pre-

vent his being also and at the same time an agent of the carrier, for the transaction of its business, such as the settlement of claims antedating Government operation. Section 10 of the Act, which provides for Government control, prescribes that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now prescribed by law." This would seem to authorize suits on causes of actions against the carriers themselves to be brought on service upon former agents of the carrier who continued to be agents of the Government under its operation.

The defendants' sworn pleas to the jurisdiction alleged that none of the defendants had an agent of any kind in the State of Mississippi at the time, and that the persons upon whom service was said to have been made were not the agents of any of the defendants at the time it was claimed service was made on them. Unfortunately, no proof was made on this point by defendants, but, in view of the decisions quoted below, it may be a matter of which the Court can take judicial notice.

While this point is directed against the service upon the Vicksburg, Shreveport & Pacific Railway Company, since service upon that company is relied upon, by plaintiff, to establish the jurisdiction of the Court under the terms of the statute, it may be remarked that service upon the Kansas City Southern was clearly invalid since, with regard to that corporation, it is recited in the return that a copy of the summons was delivered to A. M. Calhoun as Assistant to the Federal Manager of The Kansas City Southern Railway (Rec., page 14).

With regard to the Vicksburg, Shreveport & Pacific, the return recites that a copy of the sum-

mons and petition were served on Austin King, Freight Agent for the V. S. & P. R. R. Co.

As is stated in one of the decisions quoted below, a railroad corporation, during the period of Federal control, had nothing for a superintendent or a station agent to do. The same thing is true of a freight agent. We respectfully submit that the Court of Appeals is clearly wrong in its statement, in the latter part of the above quotation from its opinion, that an individual could at the same time be an agent of the Director General and of the railroad corporation.

In the case of *Southern Cotton Oil Co.* vs. *Atlantic Coast Line R. Co.*, 257 Fed., 138, Evans, District Judge, on pages 139 and 140, said:

> Under the presidential proclamation of December 26, 1917, the possession, control, and operation of the railroads shall be exercised by and through William G. McAdoo as Director General. When the Director General assumed control, the acts of the former officers and employes, who retained their positions and conducted the details of operation of the railroads, were the acts of the Director General. Rutherford vs. Union Pac. R. Co. (D. C.), 254 Fed., 88. *Their employment by the Director General made them exclusively the servants or agents of the employer. There could be no divided allegiance as agents of the railroad corporation and of the Director General,* so as to accomplish the purpose of Congress. The acts of Congress, the proclamation of the President, and the general orders of the Director General neither expressly nor by implication contemplated a dual agency of employes engaged in the operation of the railroads.

The agents sought to be served in these cases had ceased to act for the corporation in the operation of the railroad. *The corporation was out of control of the railroad, was out of possession, and had nothing for the superintendent or station agent to do.* The former agents *had ceased to be agents of the corporation pending federal control, and had become agents of the government.* Hence service on the government's agents was not service on the corporation's agents, and the corporation has not been served under the Georgia statute, which permits service on a corporation by serving its agent.

In the case of *Mardis* vs. *Hinds,* 258 Fed., 945, Youmans, District Judge, on page 947, said:

From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive posesssion and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. *The railroad Company has nothing to do with such operation. When the Director General assumed control all the employes on the railroad ceased to be employes of the railroad company and became employes of the Director General.* At that time the relation of master and servant ceased to exist between the employees operating the railroad and the railroad company. That relation then began and still exists between such employes and the Director General.

As observed in connection with the previous heading, the fact that the return refers to Austin King as freight agent of the V. S. & P. R. R. Co. is not conclusive.

As is said in *Westbrook* vs. *Director General, supra*:

> They (railroad operations) were for months carried on over each line of railroad *in the name* of its owner, but these *names* were all *aliases* of the *United States.*

Wood vs. *Clyde S. S. Co.*, 257 Fed., 879;
Northern Pacific R. R. Co. vs. *North Dakota*, 250 U. S., 135;
Castle vs. *Southern Ry. Co.*, 99 S. E., 846.

It is respectfully submitted that the lower court was without jurisdiction of this cause and defendants' motion to dismiss on this ground should have been sustained.

II.

Plaintiff's petition does not state a cause of action.

Section 16 of the Act provides that where a carrier fails to comply with an order of the Commission for the payment of money, the party in interest may file in the proper court "a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises."

The petition in the present suit contained in the first paragraph an allegation that "Petitioner is lawfully and rightfully entitled to receive and

does hereby claim against" defendants (naming them) $6,756.04, with interest, etc., "as for their damage and reparation, in accordance with a report and order of the Interstate Commerce Commission," etc. The following paragraphs are then given over to recitals concerning certain proceedings had before the Commission leading up to the order referred to.

Nowhere in the petition can there be found any "setting forth," however briefly, of "the causes for which he claims damages." Under the provisions of the Act, the gist of plaintiff's case in an action of the character contemplated is that he has been subjected to the payment of rates which were unreasonable, or unjustly discriminatory, as the case may be. The order of the Commission in the premises is to be pleaded merely as substantiating evidence of the fact alleged and is in no sense the basis of the action.

This is all too obvious to require argument, but we shall quote somewhat at length from the opinion in the case of *Baer Bros. Merc. Co.* vs. *D. & R. G.*, 200 Fed., 614. That case was, like this, a suit upon an award of reparation made by the Commission. The defendant had demurred to the petition on various grounds, the first of which was that it contained no allegation that the rate charged was unreasonable and excessive or otherwise contrary to law. In passing upon the demurrer, the court said, beginning at page 616:

(1) Coming to the first ground, which is that the complaint fails to show an unreasonable rate, and therefore no ground for recovery in this respect, the Court is of the opinion that this ground is well taken. The statute (Section 4 of Act June 29, 1906, amended Section 15 of Act Feb. 4, 1887) provides that it shall be within the power of the Commission, where rates or changes are "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act," to determine and prescribe what will be the just and reasonable rate or rates, etc. It is further provided by Section 5 of Act June 29, 1906, substituting Section 16 of the former Act, that, where it is necessary to have recourse to the courts of the United States for the enforcement of the order of the Commission, there shall be filed "a petition setting forth briefly the causes for which the complainant claims damages and the order of the Commission in the premises." It will be noted from this that the petition must set forth "the causes for which the petitioner claims damages." Since as we have seen by the quotation from Section 4 above, these causes under the law are that the rates are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of law, it follows that, to make the petition complete, it must set forth one or the other of these causes. It is not sufficient to set forth the proceedings of the Commission alleging these causes. *While these by way of recital show the grounds upon which the Commission proceeded, they do not*

afford any basis upon which the Court may proceed. A long line of authorities show that *the functions of the Court are not simply to execute the orders of the Commission,* but to afford a judicial inquiry surrounded by all the proper judicial safeguards as to whether the orders of the Commission should have been made. Upon questions of fact it is true the finding of the Commission is, under Section 5 of Act June 29, 1906, *prima facie* evidence of the facts at the trial of the cause, but this is a mere matter of evidence, and has no relation to the pleadings. *The pleadings must tender an issue* as to whether the rates are unreasonable, discriminatory, or otherwise violative of law, and a petition such as this, which does not tender this issue, affords no basis upon which the Court may proceed to a judicial determination with the assistance of the jury as to whether the rates were in fact illegal. A brief reference to the authorities will show the relation of the courts to the Interstate Commerce Commission in matters of this kind. Thus in *Interstate Commerce Commission* vs. *A. T. & S. F. Ry. Co.* (C. C.) 50 Fed., 295, 305, it is pointed out by Judge Ross that the Court is "not a mere executive organ to carry out the orders of the Commission." In *Western N. Y., etc., R. R. Co.* vs. *Penn. Refining Co.*, 137 Fed., 350, 70 C. C. A., 30, it is said:

"The parties are entitled to an impartial trial by jury, so conducted as to afford to them in full measure the enjoyment of their constitutional right."

In the same case, citing the authorities fully, it is said:

"Additional evidence may be put in by either party and the duty of the Court is to decide * * * upon the entire body of the evidence."

It is also said:

"The cause of action is examined *de novo* and the proceeding is in a qualified sense independent of the investigation by the Commission."

The Court further says:

"Whether a given transportation charge is just and reasonable or unreasonable and excessive is peculiarly a question for the jury."

The proceeding in court is denominated in *Interstate Commerce Commission vs. Cincinnati P. & V. R. R. Co.*, (C. C.) 124 Fed., 630, as "an original, independent responsibility on the Court to due inquiry make, exercise its own judgment, and decide causes as they arise or are instituted."

In *Interstate Commerce Commission* vs. *Cincinnati, N. O. & T. P. Ry. Co.*, (C. C.) 56 Fed., 925, 934, it is said:

"It is impossible to believe that, under this language of the Act, the powers of the Court in the premises are restricted, as contended for by the Commission. The provision, 'if it think fit, to direct and prosecute in such mode, and by such persons, as it may appoint, all such inquiries as the Court may think needful,' etc., must necessarily authorize the Court to provide for the taking and hearing of such additional evidence as may be proper; and the power is equally clear to permit such pleadings as will bring before the Court clearly and in legal form such matters as may be pertinent and proper, in view of the issues raised."

In *Ky. & I. Bridge Co.* vs. *L. & N. Ry. Co.*, (C. C.) 37 Fed., 567, 613 (2 L. R. A., 289) it is said by the Court:

"We are also clearly of opinion that this Court is not made by the Act the mere executioner of the Commissioner's order or recommendation, so as to impose upon the Court a non-judicial power. * * * The suit in this Court is, under the provisions of the Act, an original and independent proceeding, in which the Commission's report is made *prima facie* evidence of the matters of facts therein stated. It is clear that this Court is not confined to a mere re-examination of the case as heard and reported by the Commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

If, as apparently contended by plaintiff's counsel, it is sufficient merely to plead the proceedings before the Commission, then all of these comments upon the independent functions and responsibilities of the courts in the matter lose force, since the only issue tendered by the pleadings is whether the Commission so acted. That the law did not contemplate this, however, is shown, not only by these authorities, but by the plain terms of the Act, which provides, not only for the setting forth of "the order of the Commission in the premises," but also "the causes for which complainant claims damages." This latter provision of statute would be entirely useless if all that is necessary upon the subject of the grounds of

damage is to set forth the grounds before the Commission. I deem it clear from the statute that the grounds presented to the Commission must be reiterated in the pleadings addressed to the Court, and tender an issue upon which testimony may be taken pro and con, subject only to the provision of law that the "findings and orders of the Commission shall be *prima facie* evidence of the facts therein stated."

The Circuit Court of Appeals, in its opinion (Rec., pages 78-79), said:

The complaint is criticized because it does not charge that the rate was unreasonable in fact. No demurrer was interposed to it and objection was first made to it after judgment. If the complaint sets out a cause of action, no matter how imperfectly, it will withstand objection first made after judgment. The action sued on is a specific one, created by the Act to regulate Commerce. Section 16 of that Act provides that if the carrier does not comply with an order for the payment of money within the time set in the order, the complainant may file in the Circuit (District) Court of the United States a petition setting forth briefly "the causes for which he claims damages and the order of the Commission in the premises." It also gives to the award and order of the commission the force of prima facie evidence of the facts contained in it. The purpose of the action is the enforcement of the award. In view of the peculiar nature of the action we think that a complaint which sets out the findings of the Commission and its order, and

> claims damages due the plaintiff under it, was sufficient to withstand objection made for the first time after judgment that it showed no cause of action. The finding of the Commission that the rate was unreasonable was made prima facie evidence of that fact. The plaintiff, to sustain his complaint, was required to offer no evidence, except the award and order of the Commission. His averment was as broad as his proof was required to be. The action was a statutory one to enforce the award of the Commission, and by the statute, proof of the award of the Commission was prima facie sufficient to sustain the plaintiff's case. The statute requires the petitioner merely to set out the causes for which the plaintiff claims damages and the order of the Commission in the premises. The defendants had full information from the complaint as to the cause of action they were required to meet. Technical rules of common law pleading are inapplicable to the statutory form of action, created by the Act to Regulate Commerce for the enforcement of order of the Commission.

If the Circuit Court of Appeals is correct in holding that the allegations of the complaint can be eked out by the findings of the Commission (which we deny), there is the further difficulty that the findings of the Commission, as we shall show in the next point, in and of themselves, show clearly that plaintiff has no cause of action.

The Court of Appeals says:

> The action was a statutory one to enforce the award of the Commission, and by the statute, proof of the award of the Commission

> was prima facie sufficient to sustain the plaintiff's case.

The reasoning of the Court of Appeals, above quoted, shows the error into which the Court of Appeals and the trial court fell with regard to this case. The statute does not make the award of the Commission prima facie sufficient to sustain the plaintiff's case. The statute simply makes the findings and order of the Commission prima facie evidence of the facts stated therein—a very different proposition. The question remains whether on the facts as found, a legal liability was shown. This is a question of law and not of fact. The trial court fell into the same error as is shown by the recital in the bill of exceptions (Rec., page 36), that the Court held that on "the matter as submitted to it, it could not go behind the award, and the Court gave judgment for the plaintiff."

It is our contention that on the facts found by the Commission, in its reports, there is no liability on the part of defendants. If the findings of the Commission are to be considered at all as a part of the petition, the argument under Point III of this brief should be considered in this connection since even when so supplemented, the petition does not state a cause of action. We contend, however, that the requirement that the petition tender the issues in clear, concise language, precludes the inclusion of any extraneous matter, and that, as stated above, it is fatally defective, requiring a reversal of the judgment.

As is said by Mr. Chief Justice Marshall in Slocum vs. Pomeroy, 6 Cranch, 221:

> It is not too late to allege as error in this Court a fault in the declaration which ought

to have prevented a rendition of the judgment of the court below.

See also,

Griggs vs. *Nadeau*, 221 Fed., 381, citing cases.

III.

The Commission's Findings of Fact were, on their face, insufficient to sustain its order of reparation and the judgment based thereon.

The findings of fact of the Commission may be summarized as follows:

1. The 20 cent rate complained of was established by the carriers early in 1910 at the request of the complainant, the rate previously in effect being 27 cents (Rec., page 41).

2. Of all the shipments shown to have been made by complainant under the rate in question from February, 1911, up to the date of the hearing, about 60 per cent. moved via Shreveport, a haul of about 398 miles. The remainder moved via Baton Rouge, a haul of about 354 miles (Rec., page 41).

3. The rate on lumber and box shooks from Delta Point, Louisiana, to Port Arthur, at the time certain of these shipments moved, was 13 cents. The rate of Vicksburg, Shreveport & Pacific on box shooks from Vicksburg to Delta Point during the same time was 3

cents. The sum of the intermediate rates in effect from Vicksburg to Port Arthur, via this one route, at such time was therefore 16 cents, or 4 cents less than the joint through rate. On May 14th, 1913, the 13 cent rate was advanced to 17 cents, thus making the aggregate of the intermediate rates equal to the joint through rate of 20 cents. *The situation, i. e., the aggregate of the intermediate rates being less than the through rate, as it existed before the increase and during the period when the shipments in question moved, was covered by an application filed by defendants under the provisions of the fourth section of the Act* (Rec., pages 42, 45).

4. The 13 cent rate referred to was not a specific rate from Delta Point, Louisiana, but was a blanket or group rate, applying to Port Arthur from all stations in Louisiana on the 170 miles of line of the Vicksburg, Shreveport & Pacific Railway, of which Delta Point was the most distant point (Rec., page 42).

5. The evidence was that the 13 cent rate, during the time it was in effect from Delta Point to Port Arthur, was merely a "paper rate"; that is to say, there had never been a movement of lumber or shooks from Delta Point, or any of the Vicksburg, Shreveport & Pacific stations, to Port Arthur. It was likewise shown that there had never been a movement of box shooks, car loads, from Vicksburg to Delta Point, so that the 5 cent rate, constituting the other factor of the 16 cent combination, was also a "paper rate" (Rec. pages 43, 46).

6. The rate of 20 cents per 100 pounds charged on the shipments which moved via Shreveport was unreasonable to the extent that it exceeded the sum of intermediate rates based on Delta Point, amounting to 16 cents per 100 pounds (Rec., page 43).

7. The same 20 cent rate via Shreveport, the distance being 398 miles, did not appear to be unreasonable after the aggregate of the intermediate rates was increased to 20 cents through the advance of the rate from Delta Point to Port Arthur; and the rate of 20 cents per 100 pounds applied on the shipments moving, via. Baton Rouge, the distance being 354 miles, did not appear to have been or to be unreasonable at any of the times involved (Rec., page 43). Complainant contended for the same rate via both routes and regarded such rate as was found to be reasonable for the route via Shreveport as the proper measure of the rate to be applied via Baton Rouge (Rec., page 42).

The Circuit Court of Appeals, in its opinion (Rec., page 79), said:

We may say, however, that the Court properly rendered judgment for the plaintiff in view of the state of the record. The judgment recites that the plaintiff offered the award and order of the Commission and rested, and that the defendants introduced no evidence. The Act of Congress gives to the award and order of the Commission prima facie effect, and it

does this regardless of the correctness or incorrectness of the findings of the Commission. The defendants are not permitted to destroy this prima facie effect by internal criticisms of the Commission's findings. The defendants have the right to overcome the prima facie effect of the findings of the Commission in a suit to enforce the award in the District Court only by offering evidence in that court tending to impeach their correctness. If the defendants offer no evidence to rebut the prima facie case made by the plaintiff's introduction of the award and order of the Commission, then the District Court has nothing to do but apply the statute and render judgment for the plaintiff on the unrebutted prima facie case made by him. The Act of Congress provides that "on the trial in such suits, the findings and order of the Commission shall be prima facie evidence of the facts stated therein." The unreasonableness of the rate and the amount of plaintiff's damage caused thereby, were found by the Commission. The introduction of the award and order of the Commission showed prima facie that the rate was unreasonable and that the plaintiff was injured thereby to the extent of the award. If the defendants declined to introduce evidence to rebut the plaintiff's case so made, the District Judge had no alternative than to render judgment. He did not rule that defendants could not rebut the prima facie case made by plaintiffs but that they had not done so, and, not having done so, that he was required to treat the plaintiff's prima facie case, which was unrebutted, as entitling the plaintiff to a judgment.

There was no occasion, however, for the introduction of additional evidence since defendants' contention was simply that the facts found by the Commission and virtually adopted by the lower court as its special findings, were insufficient to support the judgment rendered.

1. *The order was void because in violation of the express provision of the Fourth Section of the Act to Regulate Commerce.*

The Commission did *not* find that the 20 cent rate was *inherently unreasonable* or *unreasonable per se.* It found it to be unreasonable for the *sole reason* that under the Commission's rule of practice there exists a presumption of unreasonableness *wherever a joint rate exceeds the aggregate of intermediate rates.* We contend that the effect of the protction afforded by the fourth section application was to destroy absolutely this presumption, and hence there being no presumption, there could be no lawful finding of unreasonableness which depended upon it for its existence.

In other words, the entire findings must be read and considered together. If in legal effect one finding destroys or neutralizes another, then the latter cannot be made the foundation of the judgment. The finding of the Commission (Rec., page 42), clearly indicates that the Commission's finding of unreasonableness was based on a presumption. It says:

> However, we have consistently held that a joint rate which exceeds the aggregate of the intermediate rates is prima facie unreasonable; and that the burden is upon the carrier to defend the higher joint rate.

The findings of the Commission contain no other basis for the finding of unreasonableness than the statement just quoted.

But as a legal proposition this presumption is non-existent, for the reason that there was pending at the time a fourth section application which protected the discrepancy between the through rate and the aggregate of intermediate rates. This is apparent from the Commission's statement (Rec., page 45):

> The previous discrepancy between the through rate and the aggregate of the rates to and from Delta Point was protected by an appropriate fourth section application.

The fourth section application legalizes, during its pendency, this discrepancy. This arises from the express language of the amended fourth section. Section 4 of the Act to Regulate Commerce as amended June 18, 1910, prohibits a through rate in excess of the aggregate of the intermediate rates. This prohibition is not absolute however, but carries the further proviso that a carrier may, upon application to the Commission, be relieved by it from the operation of this section. The section also contains the further qualification as follows:

> Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act. Nor in any case where application shall have been filed before the Commission in accordance with a provision of this section until a determination of such application by the Commission.

Under the statute, the discrepancy was lawful. From a lawful discrepancy no presumption of unlawfulness or unreasonableness can possibly arise. The result is that the Commission's presumption of unreasonableness, said to arise from this discrepancy, is completely neutralized by the protection afforded by the pending fourth section application.

Hence, the findings as made by the Commission do not authorize or justify a judgment in favor of the plaintiff.

The Court in this case says:

> The defendants are not permitted to destroy this prima facie effect by internal criticisms of the Commission's findings.

But does this rule prevent us from contending that, taken as an entirety, the findings do not authorize the judgment rendered in the trial court. For illustration, if the Commission's findings of fact affirmatively established that the cause of action was barred by a statute of limitations which extinguished the right of action, or that the claim for which reparation was sought had been paid, or was not the property of the plaintiff, and the court nevertheless should render a judgment for the plaintiff, it would be the duty of the appellate court to declare that the facts found did not support the judgment and hence it should be reversed.

Our contention here is the same as the contention in *Michigan Central Railroad Co.* vs. *Elliot*, 256 Fed., 18 (Court of Appeals, Second Circuit), where the Court said:

> On the very finding of the Commission, judgment should have been given for defendants.

In conclusion, we beg to quote the following from *Appalachia Lbr. Co.* vs. *R. R. Co.*, 25 I. C. C., 173, 197, where the Commission itself has given to fourth section applications the construction and effect for which we are contending:

> The fourth section as originally enacted was not effective in preventing a violation of the long and short haul rule, and it has been for many years understood that this rule was habitually disregarded. By amendment effective June 18, 1910, that section was strengthened. This amendment provided that in cases where the rule of the fourth section was being violated carriers might file with the Commission, on or before a certain date, application asking leave to continue to disregard the long and short haul rule, and that no carrier should be treated as in default of the amended fourth section until the Commission had investigated and passed upon this application.
>
> Under this provision over 5,000 applications were filed before the date fixed, and these two applications were among that number. Now, we think that it plainly appears, from the action of Congress in providing that no carrier should be proceeded against for a violation of the fourth section until its application has been acted upon, that it was the intent of Congress to say that matters should be left in statu quo until that time. *It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the law-making authority had expressly sanctioned existence of such disregard.*

The decision was repugnant to other well established rules of law, and rules adopted by the Commission, of which a few will be given.

2. *An order of the Commission awarding reparation must be supported not only by a finding that the rate charged was unreasonable, but also by a finding as to what would constitute a reasonable rate. The order herein was not so supported and is void.*

As pointed out by the Supreme Court in the case of *Baer Bros. Merc. Co.* vs. *D. & R. G.*, 233 U. S., 479, 34, S. C. R., 641, 644, a complaint before the Commission may present merely a claim for reparation on past shipments, thus invoking only the *quasi*-judicial power of that body to measure past injuries sustained by a private shipper, or it may involve the fixing of rates for the future, thus addressing itself to the Commission's *quasi*-legislative power, to prevent future injury to the public. Again, it may involve both the subject of reparation and of future rates, as was the situation with respect to the complaint filed in the present case.

The complaint charges that the rate of 20 cents in effect was unreasonable, alleges that a reasonable one would be 15 cents, which it prays may be established for the future, and asks for reparation on all of the shipments "made from and to the point embraced in this complaint during the past two years, to be measured by the difference between the unjust and unlawful rate of 20 cents per 100 pounds, and such just and lawful rate as may be established by the Commission."

The complaint, therefore, presented squarely to the Commission the two questions of what was a reasonable rate for the past two years and what

would be a reasonable one for the next two years. It is submitted that no one can read the three reports of the Commission in this case and say that it answered either of these questions. True, it found the 20-cent rate over one route to have been unreasonable during a certain period "to the extent that it exceeded the sum of the intermediate rates," and it also found that complainant was entitled to reparation "in an amount represented by the difference between the charges it paid and the charges which would have accrued at the rate herein found to have been reasonable"; but nowhere in any of the reports is there any finding whatever as to the reasonableness of this combination or of any one of the intermediates going to make it up. On the contrary, the reports disclose indisputably that the Commission did not inquire into such question, but merely assumed their reasonableness from the mere fact that the rates were in existence.

A statement made in an order of the Commission that it is based upon a finding that a rate is reasonable or unreasonable, as the case may be, will not suffice to support such order if it appears elsewhere in the record that no such finding was in fact made. *Southern Pac. Co.* vs. *I. C. C.*, 219 U. S., 433, 31 S. C. R. 288.

In the case of *Meeker* vs. *Lehigh Valley*, 236 U. S., 412. 35 S. C. R., 328, 334, which involved a suit on a reparation order of the Commission, the Supreme Court said that the Act requires the Commission, in awarding damages for the exaction of unreasonable rates, to make a finding of the ultimate facts—a finding which would disclose, among other things, "whether the rate collected from the shipper was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service."

It is submitted that the only facts affirmatively found by the Commission in this connection were that (1) the through rate was 20 cents per 100 pounds, while (2) the combination of locals was only 16 cents. Can it be said that its so-called finding from these facts that the through rate was unreasonable necessarily carried with it a finding also that the combination of 16 cents was reasonable?

It is to be remembered that the rate of 20 cents attacked by the complaint applied to the route via Baton Rouge as well as to that via Shreveport. *It was only as to the latter that it was found to have been unreasonable, although such route was the longer by some forty-four miles.* There was no suggestion either in the evidence or in the findings of the Commission that there was anything peculiar to the conditions, affecting transportation over the shorter route which would justify a higher rate than was reasonable for application over the other. On the contrary, the position of the complainant was, as stated by the Commission in its original opinion (Rec., page 42), that the same rate should apply to both routes, and the whole case proceeded upon this theory. The Commission, too, in its conclusion as to the rate for the future, and also as to the rate for the past subsequent to May 14, 1913, sanctioned the same rate for both routes. If 16 cents was a reasonable rate for the longer route it was also reasonable for the shorter one. The specific finding, however, that the 20-cent rate was not shown to have been unreasonable so far as the shorter route was concerned completely negatives all idea of a finding that 16 cents was a reasonable rate for the longer route.

Again, there was absolutely no evidence or finding by the Commission of any difference in the con-

ditions affecting the transportation of the commodity in question over either route as between the period covered by the order of reparation and the time subsequent thereto. As a matter of fact, all evidence was directed to the same time. It follows, therefore, if 16 cents was a reasonable rate for the period covered by the order, it was also reasonable for the time subsequent. Yet the specific finding that as to this subsequent time the 20-cent rate was not shown to have been unreasonable completely negatives the idea that 16 cents was found reasonable for the earlier period.

There are several findings embodied in the formal reports of the Commission, made by it from all of the evidence, any one of which is sufficient completely to negative the presumption which forms the sole basis of its order of reparation herein.

3. *Such presumption was overcome by the showing that both factors going to make up this lower combination were strictly "paper rates"; that is to say, rates upon which absolutely no traffic moved.*

The basis of this asserted presumption, necessarily rests upon a prior presumption that the separately established locals are reasonable.

It requires but a moment's thought to realize that the essential thing in this presumption, or chain of presumptions, is not merely the existence of the local rates which go to make up the lower combination, but the actual performance by the carrier of transportation services under them. Rates in themselves signify nothing. They can be of significance only when considered in connection with the services to which they apply. The ser-

vice is the measure of the rate. This is both the legislative and the judicial view. The Act to Regulate Commerce emphasizes this in the first section, when it says:

> All charges for any *service* rendered, or to be rendered, in the transportation of passengers or property • • • shall be just and reasonable; and every unjust and unreasonable charge for *such service*, or any part thereof, is prohibited and declared to be unlawful.

The same fact is again recognized in the fourth section of the Act where it is declared to be unlawful for a carrier to *charge* or *receive more* "for the *transportation* of passengers or of like kind of property, for a shorter than or a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater *compensation* as a through route than the aggregate of the intermediate rates." It is not the publication of the rate that is unlawful, but the actual performance of services thereunder and the actual *making* or *acceptance* of the higher charges.

A rate under which no traffic has ever moved, or is likely to move, is the same as no rate at all. It is known as a mere "paper rate," and is entitled to no serious consideration as indicating what is, in fact, a reasonable charge for the service purported to be covered if same were actually performed.

The finding of the Commission with respect to one factor of this combination is stated in its opinion on rehearing (39 I. C. C., 734) as follows (Rec., page 46):

> They (defendants) showed that there is no movement of box shooks from Vicksburg to Delta Point.

As to the other factor, it is said in the original opinion (Rec., page 43):

> Defendants' witness testified that the 13-cent rate formerly in effect from the stations on the Vicksburg, Shreveport & Pacific to Port Arthur was made to meet the competition of mills near Port Arthur, from which very low rates apply, and that it was canceled because it was found that there had been no movement of lumber or shooks from those stations to Port Arthur. They contend that as it was merely a paper rate, it should not be used as a basis or measure for the rate from Vicksburg.

The Commission has held many times that a paper rate is the same as no rate at all, so far as concerns its value in determining a question of reasonableness or discrimination in rates.

We quote from the opinion in the case of *Export Rates on Flax Seed Products from Minneapolis*, 27 I. C. C., 246, 247:

> They compared the rate on these commodities with the rates on grain to Galveston for export, of 33¼ cents on wheat and 31¼ cents on corn. It appears, however, that practically no grain is shipped to Galveston for export, and therefore the rates are paper rates and not fairly comparable.

The case of *Missouri and Kansas Shippers' Assn. vs. M. K. & T.*, 12 I. C. C., 483, would seem to

determine conclusively that a violation of the fourth section cannot be predicated upon what is shown to be a mere paper rate. In that case a rate was shown to be technically in violation of the old fourth section. The lower rate to the more distant point, however, being shown to be a mere paper one, the complaint was dismissed, Commissioner Harlan saying in the opinion (page 484):

> While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentious proceedings of this kind it ought to examine into the real substance of the matter unembarrassed by considerations that are purely technical. Looking at the complaint from this point of view, it seems to us wholly without merit. We are unable to accept a merely theoretical or paper rate, for the longer haul, that has not been used and was unknown either to the defendant or to the complainant, until casually discovered after it had been the published rate for some years, as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate. This view of the matter is supported by the uncontradicted evidence of the defendant, tending to show that the Class C rate of 10 cents to St. Joseph was not a compensatory rate on hay, and by the complete failure of the complainant to show that the rate to Kansas City was in itself excessive. That issue, although raised in the complaint, was abandoned on the hearing.

It would thus seem to appear conclusively that if any *prima facie* showing of unreasonableness in

the through rate did arise from the fact that it exceeded the combination of locals, this was entirely overcome by the undisputed evidence that both factors used in making up this lower combination were paper rates.

The courts have taken a similar view.

In the case of *Lehigh Valley R. Co.* vs. *Rainey*, 112 Fed., 487, the carrier had sued to collect freight charges on certain shipments of coal. The defense seems to have been that the rate assessed by the carrier was unlawful because discriminatory. The Court directed a judgment for the plaintiff and, in its opinion on motion for a new trial, said:

> A reconsideration of this case has failed to change my opinion that the Court was justified in directing a verdict in favor of the plaintiff. For present purposes it must be assumed that the rate complained of was discriminating, but I still think that a mere paper rate, which is never carried into effect, and is therefore simply a proposition to carry for a specified sum, is not such a violation of the Interstate Commerce Act as to prevent the carrier from recovering freight from other than the theoretically favored shippers. It is discrimination in fact, and not a mere intention to discriminate, that is punishable; and in the case before the Court there was no evidence that a pound of coal had been carried to be sold in the market by any other shipper than the defendants. Hence no rival of the defendants was benefited by the unaccepted rate, and no harm was done to their business.

Cameron vs. *Santa Fe*, 44 I. C. C., 286;
Oklahoma Traffic Assn. vs. *V. A. & S. Ry.*, 36 I. C. C., 329;

Mosby vs. *Y. & M. V. R. Co.*, 48 I. C. C., 499;
Sligo Iron Co. vs. *Santa Fe*, 17 I. C. C., 139;
Consumer's Ice Co. vs. *Santa Fe*, 18 I. C. C., 277.

4. *Such presumption was equally overcome by the further fact found by the Commission, that the factor of the combination applying from Delta Point to Port Arthur was a group or blanket rate applicable from a large number of points of origin, whose distances from destination vary as much as 170 miles and of which Delta Point is the most distant. A rate so applicable cannot be regarded as representing a reasonable rate when considered solely with respect to one specific point of origin, and particularly if the point taken be one of the extreme ones in the group.*

This presumption with which we are dealing, resting, as we have shown, upon a prior presumption of the reasonableness of the local rates which go to make up the lower combination, necessarily falls with the overthrow of such prior presumption. The moment it is made to appear that any important factor of the combination cannot be accepted as a measure of reasonableness, that moment the presumption is effectually rebutted.

The lower combination here involved consisted of two factors; the 3-cent rate applicable from Vicksburg to Delta Point, separated merely by the river and the 13-cent rate from Delta Point to Port Arthur. This latter factor, however, was not a specific rate from the former to the latter point, but, as stated in the Commission's original opinion herein, applied from all points on the V. S. & P.

between the Mississippi River and Shreveport, Louisiana. This matter was gone into somewhat more fully at the second hearing. The extent of this territory of origin was shown to be about 170 miles. Shreveport is 226 miles from Port Arthur. The mean point in this group would be about 311 miles from Port Arthur, or some 85 miles nearer than Delta Point.

If any presumption is to be indulged from the mere existence of this rate, in disregard of the fact that no traffic was shown ever to have been shipped under it, certainly it is not that it was a reasonable one for the service from Delta Point to Port Arthur, the greatest distance covered, but rather for all the service it was intended to cover, the average of which was much less than the greatest.

A mere statement of the situation is sufficient to impress the fact that this 13-cent rate cannot in fairness be treated as though it were a specific one applying from Delta Point to Port Arthur. In numerous cases the Commission has pointed out the impropriety of so dealing with a blanket rate.

In the case of *Brush Creek Mining & Mfg. Co.* vs. *L. & N.*, 39 I. C. C., 449, the Commission said on page 453:

> In comparing these rates with other rates, the average distance from the various points in the group to the points of destination in question must be considered, and not the distances from the points on the borders of the group.

In *Rice Rates from Helena*, 31 I. C. C., 614, the Commission was considering a proposed advance in the rates on rice from Helena to New Orleans and

other points from 10 to 20 cents per 100 pounds, carloads, and from 15 to 25 cents per 100 pounds, less than carloads. It was shown that the proposed rates would exceed the class rates from Helena to New Orleans, but it was likewise shown that the proposed rates placed Helena in a blanket in which it was about midway between the northern and southern extremes. The Commission said (page 615):

> Protestants also rely upon the fact that the proposed rates from Helena to New Orleans exceed the class rates. This fact must be considered in connection with the other facts and circumstances of record. While a commodity rate in excess of the class rate is regarded as unusual, special circumstances and conditions may justify such a departure from the general rule. This is especially true in the case of a commodity rate which applies from or to a number of points that are grouped or blanketed It might exceed the class rate from one or more points in the blanket and still be reasonable. Under the circumstances of this case we do not think the existence of lower class rates is of controlling importance.

The presumption of unreasonableness in a commodity rate arising from the fact that it is in excess of the class rate would seem to be hardly less strong than the same presumption arising against the reasonableness of a through rate from the fact that it exceeds the combination.

In *Midcontinent Oil Rates*, 36 I. C. C., 109, 115, the Commission said:

> If a blanket or group arrangement is a reasonable one, founded upon sound business and

transportation considerations, the reasonableness of a rate from the group to a given point is properly to be determined with respect to the average distance from all points in the group. The selection for comparative purposes of the shortest distance point would be as unjust to the carriers as the selection of the longest distance point would be unjust to the shippers. The group must be treated as a whole.

Northern Pine Mfrs. Assn. vs. *C. & N. W.* 33 I. C. C., 360;
Knight Woolen Mills vs. *C. & N. W.*, 32 I. C. C., 490;
Railroad Commissioners of Montana vs. *D. & R. G.*, 27 I. C. C., 522;
Victor Mfg. Co. vs. *Southern Ry.*, 27 I. C. C., 661;
Iowa R. R. Commissioners vs. *Arizona Eastern*, 28 I. C. C., 193;
Orange Rice Mill vs. *T. & N. O.*, 49 I. C. C., 250;
New York Harbor case, 47 I. C. C., 643.

If the foregoing decisions mean anything, then they preclude us in passing upon the reasonableness of the 20-cent rate from Vicksburg to Port Arthur, from comparing it with a 13-cent rate from Delta Point to Port Arthur. If this 13-cent rate is considered at all, it must be considered as a rate from a mean point in the blanket, some eighty-five miles nearer Port Arthur.

5. *Such presumption was also rebutted by the fact that the 20-cent rate applying on the same commodity, at the same time, from Vicksburg to Port*

Arthur over the shorter route via Baton Rouge was found by the Commission not to appear to be unreasonable.

During all the time involved the 20-cent rate, as we have seen, applied likewise over the route via Baton Rouge, some forty-four miles shorter than that via Shreveport, and about 40 per cent. of complainant's shipments were sent that way. There was no evidence and no finding by the Commission to the effect that there was anything peculiar to the service over this shorter route justifying a higher rate than applied over the other. It is also to be noted that, as stated in the opinion (Rec., page 42), complainant contended for the same rate via both routes and regarded such rate as was found to be reasonable for one as the proper measuer of the rate to be applied via the other.

After considering all of the evidence, however, the Commission was of the opinion that the rate did not appear to be unreasonable for the 354-mile haul via Baton Rouge, although it was found to have been so, as to a portion of the time, for the 398-mile haul via Shreveport. Since all parties proceeded at the trial upon the assumption that the same rate should be applied to both routes, it is submitted that the finding that it was unreasonable as to one necessarily raised a presumption that it was also unreasonable as to the other. This presumption was strengthened by the fact that the latter was considerably shorter than the former. Such presumption was at least as strong as that upon which the decision is based. The failure of the Commission to give effect to it must have been due to the fact that it was overcome by the evidence. Yet the evidence was the same as

to both. If it was sufficient to overcome the one it should also have been sufficient to overthrow the other.

One of the commonest tests employed by the Commission in passing upon the reasonableness of rates is that of the earnings yielded by them per ton per mile, commonly called ton-mile earnings. This 20-cent rate yields for the longer route of 398 miles almost exactly 10 mills per ton-mile, while for the shorter route of 354 miles it yields 11.3 mills. On the other hand, the rate of 16 cents used by the Commission as a basis for its order of reparation, and consequently established by it as reasonable for application over the longer route during the period involved, gives ton-mile earnings of barely over 8 mills. In other words, its order establishes as reasonable for a route which exceeds another by more than 12 per cent. a rate which is only 80 per cent. of that sanctioned as reasonable over the other.

The action of the Commission in this regard operates also as the grossest sort of discrimination between competitive carriers, and its order, being retroactive, operates as a double injury. It not only forces one group of carriers to carry at a lower rate than their competitors, but also prevents them from securing the benefit of the increased business which their lower rate would otherwise naturally bring to their rails.

6. *Such presumption was also overthrown by the finding of the Commission with respect to the same rate after the increase in the combination to the level of the through rate.*

As we have seen, where a presumption is only *prima facie,* it can be given conclusive effect *only in the absence of all opposing evidence.* The presumption of unreasonableness in a through rate which exceeds the combination is only a *prima facie* one.

The fact of the existence of this lower combination was not the only evidence in the case. Both sides introduced other evidence, from all of which the Commission concluded that the rate in question did not appear to be unreasonable, but was made to appear so only by virtue of and to the extent of this lower combination. It is submitted that the moment it appeared *from this other evidence* that, but for the existence of this lower combination, the through rate would not be unreasonable, that minute the presumption was rebutted and fell; otherwise it was not merely *prima facie,* but conclusive. To hold it to be conclusive is to violate the fourth section of the Act.

Aside from all mere rules of evidence and questions of presumptions, what is the common sense of the situation? The 20-cent rate in controversy was either reasonable or unreasonable, and if it was reasonable on May 14, 1913, it was reasonable the day before that. If it was unreasonable the day before it was unreasonable on that date, for there is no suggestion from any source of any actual difference in the service or transportation conditions involved as between these two periods. Reasonableness being an inherent quality or characteristic of a rate, the question of whether or not it attaches to a rate in a given instance cannot be made to depend upon the existence or non-existence of some other rate or rates. To say that a rate which is unreasonable today may nevertheless be

made reasonable tomorrow, without any change in its volume and without any change whatever in the service which it is designed to cover or in the conditions under which such service is performed, but solely by the mere fortuitous change of some other rate, is, it seems to us, to reduce the whole subject of rate regulation to an absurdity.

Of course, there is no absolute test of reasonableness, and a comparison of the rate under consideration with other rates which are fairly comparable is both proper and helpful in arriving at a conclusion as to its reasonableness. To make its reasonableness depend absolutely upon the existence or non-existence of other rates, however, is quite another thing, and is neither proper nor permissible. (*Interstate Commerce Com.* vs. *N. C. & St. L.*, 120 Fed., 934,, decided by the Circuit Court of Appeals of the Fifth Circuit; *I. C. C.* vs. *L. & N.*, 73 Fed., 409.)

IV.

The sufficiency of the facts found by the Commission and adopted by the lower Court to support the judgment may be examined in an appellate court without the necessity of any exceptions.

The Circuit Court of Appeals, in its opinion (Rec., page 79), said:

> The plaintiff in error contends also that the evidence does not support the judgment. The case was tried by the District Judge, a jury having been waived. The District Judge was

> not requested to make special findings, and did not make any. The general finding of the District Court has the effect of the verdict of a jury, and the judgment upon it is subject to review only because of errors of law, based on rulings of the Court, which were excepted to during the progress of the trial. No rulings of law were invoked by the plaintiff in error during the trial or excepted to; nor were there any exceptions to the rendition of judgment. The ruling of the Court below on the motion for a new trial, to the denial of which the defendants did except, is not reviewable in the Federal Court. * * *

In this case, however, the lower Court adopted the Commission's findings of fact to support its judgment, and the sufficiency of such findings may be examined without the necessity of any exceptions.

Where a jury is waived in an action at law and special findings are made by the court, no exception is necessary to raise the question whether the facts found support the judgment.

In *Seeberger* vs. *Schlesinger*, 152 U. S., 581, it is said:

> No exception is necessary in case of special findings by the court to raise the question whether the facts found support the judgment.

To the same effect are *Hooven* vs. *Featherstone*, 111 Fed., 81; *Philadelphia Casualty Co.* vs. *Fechheimer*, 220 Fed., 401; *Mercantile Trust Co.* vs. *Wood*, 60 Fed., 346; *Chicago R. R. Co.* vs. *Barrett*,

190 Fed., 118, 123; *Mutual Life Insurance Co.* vs. *Kelly*, 114 Fed., 268, 271.

But it is not necessary that the facts be actually found by the court. It is sufficient if the ultimate facts are made to appear at the trial in some form or other, which is a substantial equivalent to such finding. Thus, in *Wayne* vs. *Kennicott*, 103 U. S., 554, it was held that if there be an agreed statement of facts submitted to the trial court, upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. In *Philadelphia Casualty Company* vs. *Fechheimer*, 220 Fed., 401, 409, the facts stated in the report of the referee and adopted by the court were held to be the equivalent of a special finding. In *Anderson* vs. *Messinger*, 146 Fed., 929, "mutual stipulations which are incorporated in the bill of exceptions" were held to be the equivalent of special findings. In *Guaranty Trust Company* vs. *Koehler*, 195 Fed., 669, it was held that special findings of fact of the referee became the special finding of the court, and the writ of error presented the question whether or not this finding warranted the judgment below, and if not, what judgment it did warrant. Even where counsel agree in the appellate court to certain portions of the opinion of the trial court, as containing the material facts of the case, it is said in *Louisiana Mutual Insurance Co.* vs. *Tweed*, 7 Wall., 44, that this is sufficient to raise on appeal the question of the sufficiency of the facts to warrant the judgment. The Court said:

> Inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made.

In the instant case, the report and order of the Commission were *prima facie* evidence of the truth of the Commission's findings of fact. When the defendants introduced no testimony to rebut the *prima facie* case, it became absolute. At that moment, therefore, there was a statement of facts made partially by operation of law, and partially by the acquiescence of the defendants, which was the equivalent of a special finding by the court. This statement of facts was acted upon by the trial court and judgment pronounced on it. No exception was required.

If the law had made the Commission's finding of fact conclusive, then everyone must admit that the Commission's report when introduced in evidence performed the office of special findings or an agreed statement of facts. But here the *prima facie* case became conclusive when the defendants accepted the facts as asserted by the plaintiffs.

This, apparently, is the view taken by plaintiff's counsel, who says in his brief (page 19):

> The defendants introduced no evidence. The *prima facie* evidence thereupon became conclusive and the trial judge gave judgment in favor of plaintiff.

The ultimate facts being thus established, the lower court held that they warranted the judgment for the plaintiff, and this appeal raises the question of the sufficiency of those facts to sustain the judgment, even though no exception was taken.

The Court says in this case:

> The general finding of the District Court has the effect of the verdict of a jury and the

> judgment upon it is subject to review only because of errors of law based on rulings of the court, which were excepted to during the progress of the trial.

But this is completely answered, it is respectfully submitted, in *Wayne County* vs. *Kennicott*, 103 U. S., 554, where the Court said:

> This record shows distinctly that the court was only required to determine whether in law on the agreed facts the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiff on the case as stated.

Conclusion.

In conclusion, we submit that while the Commission and the courts should see that a shipper which has been damaged through the charging of an excessive rate or through discrimination should be awarded the damages which it has actually suffered, they should be equally careful to see that shippers are not permitted to mulct the carriers on account of technical flaws. Especially should this be true in this case where the carriers put in the through rate at the request of this plaintiff with every reason to suppose that it was a satisfactory rate. A reading of the Commission's reports in this case shows that the 20 cent rate was reasonable *per se*, and also shows the absolute inconsistency of the Commission's decision. If the 20-cent rate was unreasonable via the Shreve-

port route, it was likewise unreasonable via the shorter Baton Rouge route. If the shipper was damaged with regard to shipments via the Shreveport route, it was also damaged with regard to shipments via the Baton Rouge route and should have been awarded reparation on the latter shipments also. Why should the shipper receive reparation via one route if it does not receive it via the other route?

This 20-cent rate was either reasonable or unreasonable *per se*, and the mere increasing of the intermediate rate did not change the situation in that regard. The Commission has itself stated the true rule with regard to the awarding of damages in the cases of rates protected by fourth section applications, but has, for some reason, declined to follow it in the present case. Where a through rate is protected by fourth section application, the shipper is not entitled to reparation unless the rate is found unreasonable *per se*, or the shipper proves actual damage under Section 3, the discrimination section.

In the case of *Janesville Clothing Co.* vs. *C. & N. W. Ry. Co.*, 26 I. C. C., 628, 630, where the intermediate rate was complained of, the Commission said:

> In *Appalachia Lbr. Co.* vs. *L. & N. Ry.*, 25 I. C. C., 173, the Commission held that no damages could be awarded up to the time when the Commission passes on the fourth section application, unless a case is made out under the 3d Section which might carry with it an award of damages, or unless under the 1st Section the rate to the intermediate point has been found unreasonable.

In the case of *Humphreys Godwin Co.* vs. *Yazoo & Mississippi Valley Ry. Co.*, 31 I. C. C., 25, 28, the Commission said:

> The complaint predicates the charge that the joint rate was unreasonable solely upon the fact that it exceeded the then existing combination of intermediate rates through the Louisville gateway * * *. It has not shown that it was damaged by the payment of charges at the 33-cent rate, nor that it has been unduly prejudiced in the sale and shipment of cottonseed meal.
>
> We do not have before us any evidence tending to show that the 33-cent rate is or was unreasonable *per se* or relatively when compared with the through rate from other points in the same territory * * *.
>
> We have given full consideration to all the facts and circumstances appearing of record, and it is our conclusion that inasmuch as the situation was protected by an application for relief from the provisions of the fourth section which had not been passed upon and as the violation of the rule of that section has been removed, no reparation should be awarded.

See also *Pennsylvania R. R. Co.* vs. *International Coal Min. Co.*, 230 U. S., 184.

We submit that no different case was presented here.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1920

No. 270

The Vicksburg, Shreveport & Pacific Railway Company, The Kansas City Southern Railway Company, and Texarkana & Fort Smith Railway Company, Plaintiffs in Error.

vs.

ANDERSON-TULLY COMPANY

BRIEF FOR DEFENDANT IN ERROR

Vicksburg, Shreveport & Pacific Railway Co., Et. Als., Plaintiffs in Error,
vs.
Anderson-Tully Company, Defendant in Error.
} No. 270.

HARRY B. ANDERSON,
Attorney for Defendant in Error.

EARLY PTG. CO

Supreme Court of the United States
October Term, 1920.

VICKSBURG, SHREVEPORT & PACIFIC RAILWAY CO., ET ALS.,
Plaintiffs in Error,
Vs.
ANDERSON-TULLY COMPANY,
Defendant in Error.

No. 270

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

Plaintiffs in error will be referred to as defendants, and defendant in error as complainant.

The principal question presented by this record is as to the jurisdiction of the District Court for the Northern Division of Mississippi, the defendant contending, (a) that there was no venue in the District where the suit was brought and (b) that there was no service on the defendant.

FACTS.

The facts as shown by the record are as follows:

STATEMENT OF CASE.

On July 8, 1918, the Interstate Commerce Commission handed down an award of reparation in favor of the Anderson-Tully Company, and against the Vicksburg, Shreveport & Pacific Railway Company, the Kansas City, Southern Railway Company, and the Texarkana and Fort Smith Railway Company, authorizing and

directing them to pay to the Anderson-Tully Company, on or before September 16, 1918, the sum of $4,906.48, with interest at the rate of six per cent from March 14, 1912.

(Record, 7-9)

Payment having been refused, the Anderson-Tully Company, on December 2, 1918, brought suit for said award in the District Court of the United States for the Southern District of Mississippi, Western Division, at Vicksburg. Service was had on Austin King, freight agent, at Vicksburg, Miss., for the V. S. & P. R. R. Co., and on A. M. Calhoun, Assistant to the Freight Manager for the Kansas City, Southern Railway Company, and on W. R. Grim, Vice President and Treasurer, for the Texarkana & Fort Smith Railway Company.

On January 6, 1919, all of the defendants filed pleas in abatement to the jurisdiction of the Court, stating therein that neither of them owned or operated any railroad in Mississippi when the suit was instituted, nor had any agent of any kind in said state, nor were carrying on any kind of business in said state for several months before the institution of the suit, and denying the jurisdiction of the Court to entertain a suit between a corporation of Michigan, plaintiff, and corporations of Louisiana, Kansas and Texas, as defendants. (Record 16-18.) Issue was joined upon said pleas, and a stipulation as to the facts was filed.

(Record, 19-20)

From said stipulation it appears that the business of the V. S. & P. Railway Company was being carried on at the date of the institution of said suit, under federal control, precisely as it had been before the Government assumed control; that in connection with the Alabama & Vicksburg Railway Company, it maintained a joint ticket office and freight office in the City of Vicksburg, Miss.; that it issued passenger tickets from Vicksburg, Miss., to Shreveport, La., paying to the A. & V. Railway Company part of the mileage, and paying to the

Transfer Company which moved its cars from Vicksburg, Miss., to Delta Point, La., fifty cents for each passenger; that no division of the passenger rate was shown on the tariff filed with the Interstate Commerce Commission, which tariff was filed by the V. S. & P. Railway Company alone; that the V. S. & P. Railway Company issued through bills of lading for freight from Vicksburg to Shreveport, paying to the A. & V.. Railway Company the mileage represented by the haul east of the Mississippi River, and paying the Transfer Company five per cent of the freight on a car moved between these points; that the V. S. & P. Railway Company alone had filed a freight tariff between said points with the Interstate Commerce Commission; that the V. S. & P. Railway Company was a Louisiana corporation, and that all of its tracks were located in that State.

Upon this stipulation, the District Judge, trying the case without the intervention of a jury, by stipulation made in open court waiving the jury, overruled the pleas in abatement; and the defendants filed a joint answer in which they admitted the rendition of the award by the Commission and the refusal of the carriers to pay the same as set out in the complaint. They claimed, however, that said award was erroneous for various reasons, making the same contention which had been overruled by the Commission.

The case was then heard by the District Judge, without the intervention of a jury, a stipulation having been made in open court that neither party might *use* any part of the record before the Interstate Commerce Commission, or evidence or printed reports of findings of the Interstate Commerce Commission.

The plaintiff below introduced in evidence the report of the Commission made July 8, 1918, and the order of the same date, Exhibits A and B to the complainant; the defendants introduced no evidence.

(Record, 31)

The District Judge, holding that the report and order

of the Interstate Commerce Commission were *prima facie* evidence of all of the facts stated therein, rendered a joint judgment in favor of the plaintiff below for the sum of $4,906.48, with interest from March 14, 1912, amounting to $6,910.50 and an attorney's fee of ten per cent on this amount, $691.05.

(Record, 31)

Motion for a new trial was made and overruled. (Record, 32). March 11, 1919, a bill of exceptions was filed, in which it was recited *that no part of the record before the Interstate Commerce Commission, except the award, was read to the Court or used by either side*, and that the plaintiff rested upon the award and the admission thereof, made in the answer.

(Record, 36)

The record sent up to this Court contains what purports to be "The Interstate Commerce Commission Report and Award." (Record, 37-60) which shows no date of filing in the lower court, and which manifestly is not a complete record as no evidence is set out therein, while the award of the Commission, made Exhibit A to the complaint, recites that evidence was heard before the Commission.

The record contains what purports to be an assignment of errors (Record 62-64), but there is no date of filing marked on said instrument, nor does it appear that the same was ever filed in the lower court.

The appeal was perfected by the giving of an appeal bond in the sum of Five Hundred Dollars, and the *praecipe* calling for the insertion in the record of the various pleadings and orders before the Interstate Commerce Commission, numbered from 18 to 24, was filed on March 26, 1919. None of said instruments were before the District Court or introduced in evidence, nor do any of said instruments bear any filing mark in the lower court, as they appear in the record.

The case was taken by writ of error to the U. S. Circuit Court of Appeals, Fifth Circuit and on December

10th, 1919, the judgment of the District Court was affirmed. Grubb, District Judge, writing the opinion. (Record 76-80.)

By writ of error the defendant then appealed the case to this Court.

BRIEF AND ARGUMENT.

As counsel for plaintiff views it, there is only one question determinable by this Court upon this appeal, viz:

DID THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HAVE JURISDICTION TO HEAR AND DETERMINE THE CASE SET OUT IN THE PLEADINGS?

This question is properly raised in the record, having been raised by the filing of proper pleas in abatement, which were overruled by the judge, who tried the case without the intervention of a jury, exception having been made at the time to the action of the Court, as appears from the bill of exceptions. (Record, 35). It is raised in this Court by the first assignment of error (Record 94) and first Specification of Error, Brief 9.

DID THE LOWER COURT HAVE JURISDICTION OF THE PARTIES AND OF THE SUBJECT MATTER?

In the Act to Regulate Commerce, approved Feb. 4, 1887, and amended by various acts subsequent thereto, under section 16 of the Act, as amended, it is provided that if the carrier does not comply with an order for the payment of money within the time limit set in said order, the complainant may file in the Circuit Court of the United States for the District in which he resided, or in which is located the principal operating office of the carrier, *or through which the road of the carrier runs*, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly *the causes for which he claims damage* and the order of the Commission in the premises. It is further provided that where the award is made against several carriers, they may be all joined in one suit in any District

where any one of said joint defendants may be sued, and that service of process against any one of said defendants, who can not be found in the district where the suit is brought, may be made in any district where such defendant carrier has its principal operating office.

Under the stipulation as to the tariffs and business of the V. S. & P. Railway Company, the Louisiana corporation, it is clear that the suit could have been established in Vicksburg against this carrier in the federal court for the Southern District of Mississippi, unless the fact that at the time the suit was instituted the said carrier was being operated under Government control altered the situation. At the time this suit was instituted the V. S. & P. Railway Company was maintaining a ticket and freight offfice in the City of Vicksburg, Warren County, Mississippi, and was issuing through tickets from Vicksburg to Shreveport, and through bills of lading for freight between the same points. It had filed passenger and freight tariffs with the Interstate Commerce Commission covering these matters, which would be totally unnecessary and a void act if it were operating a railroad in the State of Louisiana alone.

THE ANSWER ADMITS THAT UP TO DECEMBER 27, 1917, THE DEFENDANTS WERE COMMON CARRIERS ENGAGED IN RAILROAD TRANSPORTATION OF PASSENGERS AND PROPERTY BETWEEN THE POINTS OF VICKSBURG, MISS., AND PORT ARTHUR, TEXAS.

(Record, 21)

Its method of operating its road was to bring its trains to Delta Point, La., on the opposite side of the Mississippi River from Vicksburg, and to have said trains brought to the east bank of the River by a transfer company, which was paid for this service by the V. S. & P. Railway Company, and the trains were taken by the A. & V. Ry. Co. from the transfer boat to the freight and passenger depot, maintained jointly by the V. S. & P. Railway Company and the A. & V. Railway Com-

pany. Manifestly, the V. S. & P. Railway Company was operating a railroad in the State of Mississippi from the time its trains crossed the state line between Louisiana and Mississippi, which state line is the middle thread of the main channel of the Mississippi River at this point.

DID GOVERNMENT CONTROL OF THE V. S. & P. RAILROAD UNDER THE UNITED STATES RAILROAD ADMINISTRATION ACT ALTER THE SITUATION?

Section 10 of said Act provides as follows:

> "That carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except insofar as may be inconsistent with the provisions of this Act or any other Act applicable to said Federal control, or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered *as now provided by law; and in any action at law or suit in equity against a carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality of the Federal government.*"

It is respectfully insisted that the meaning and purport of this section of the Railroad Administration Act is too plain for discussion; that although the Government was in control of the railroads, the railroads were still doing business, and suits at law or in equity could be established against them just as they could have been established prior to the passage of this Act, and that service upon the agent of the railroad in Warren County, Mississippi, was sufficient to bring the corporation before the courts. There can be no question but that this suit could have been established on the award of the Commission in the District Court at Vicksburg prior to the passage of the Railroad Administration Act, and that the fact that the freight agent at Vicksburg was paid his salary in December, 1918, by the Government,

did not alter the fact that this freight agent was a representative of the railroad. It is therefore respectfully insisted that the District Judge committed no error in overruling the pleas in abatement filed by the defendants.

As stated by Judge Grubb in his opinion below:

> "(*b*) It is contended that the defendant, the Vicksburg, Shreveport & Pacific Railway Company, was not properly served. The return of the Marshal is that the summons was 'executed by handing a true copy of this Summons and Petition for Judgment to Austin King, Freight Agent for the V. S. & P. R. R. Co., Vicksburg, Miss., Dec. 4, 1919.' Plaintiff in error contends that the defendant railroad was then in Government operation and control, of which the Courts take judicial notice and hence, that the person served was an employe of the Government and not an agent of the carrier. The return is to the effect that, at the time of service, to whom the copy was handed, was an agent of the defendant railroad company. The return so long as its recital is unamended, is conclusive of the character of the person served. The fact that King was an employee of the Government would not necessarily prevent his being also and at the same time an agent of the carrier, for the transaction of its business, such as the settlement of claims antedating Government operation. Section 10 of the Act, which provides for government control, prescribes that 'actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now prescribed by law." This would seem to authorize suits on causes of actions against the carriers themselves to be brought on service upon former agents of the carrier who continued to be agents of the Government under its operation."

It is insisted, however, by counsel for defendants that Section 16 of the Act to regulate Commerce has been

repealed by the Act of October 22, 1913 (38 Stats. at L. 219). This Act was passed for the sole purpose of abolishing the Commerce Court and, as a necessary incident, for disposing of the appeals pending before it, and also to provide means for enforcing in the future such orders of the Interstate Commerce Commission as formerly were enforced by the Commerce Court. The Commerce Court never had jurisdiction to enforce a reparation award of the Commission and the abolition of the Court could not possibly affect the jurisdiction then inhering in the District Courts of the United States and the State Courts, in which services of process could be had upon the recalcitrant carriers. The Act expressly provides that:

> "The jurisdiction *vested in said Commerce Court* by said Act is transferred to and vested in the several District Courts of the United States and all Acts or parts of Acts *insofar as they relate to the establishment of the Commerce Court* are repealed."

It is too plain for discussion that Congress did not have up before it the whole subject of the jurisdiction and procedure attending all matters brought before the Commission and that it was dealing only with those subjects over which the Commerce Court had jurisdiction.

The Act further provides that appeals of all cases Court should be direct to the Supreme Court, not to the U. S. Circuit Courts of Appeal.

This covers specifications of Error I. to IV (Record transferred to the District Courts from the Commerce 9-10).

II.

The fifth specification of error raises the question that the petition does not state facts sufficient to constitute a cause of action against the defendants or any of them.

The petition states that the award of reparation was made by the Interstate Commerce Commission on July

8, 1918, in the sum of $4,906.48, and an order had been made against all three of the defendants to pay said sum on or before September 16, 1918; that the railroads had failed and refused to comply with the order. Under Section 16 of the Act to Regulate Commerce, it is provided that where the carrier does not comply with the order for the payment of money within the time limit set by said order, a complaint may be filed in the United States Circuit Court in the district through which the road of the carrier runs, setting forth briefly the cause of the action for which damages are claimed and the order of the Commission in the premises; that such a suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages except that, *"on trial in such suits, the findings and order of the Commission shall be prima facie evidence of the facts stated therein."*

It is respectfully submitted that the petition filed in this cause is in exact accord with the provisions of the Act to Regulate Commerce, and that it states a perfectly good cause of action. The cause was heard by the District Judge, without the intervention of a jury, the parties having, in open court, waived the jury, which they are permitted to do in both the State and Federal Courts. The finding of the Judge was a general one, to-wit: that the suit being to enforce an award of reparation made by the Interstate Commerce Commission, which award was pleaded in the complaint and admitted in the answer, and *there being no other evidence submitted by either party*, the award was conclusive. No exception was made to this ruling of the Court, and therefore the same is not reviewable by an appellate tribunal.

> "Where a case is tried without a jury, there is no right of review by the appellate court, when findings of fact are not made, except as to rulings of the court during the trial, *excepted to at the time, and presented by the bill of exceptions;* and a statement of the Court in its opinion as to the facts and

the evidence does not fall within 'rulings' as contained in the statute."

U. S. Rev Stat. 649 and 700.
Keeley vs. Ophir, etc. Co., 169 *Fed.*, 508.
Mason v. Smith, 191 *Fed.*, 502.
Streeter v. Sanitary Dist., 133 *Fed.*, 127.
Bell vs. V. P. Railway Co., 194 *Fed.*, 366.
Steinhouser vs Order St. Benedict, 194 *Fed.*, 289.

"The assignment that there is no evidence to support the judgment is a question of law, which cannot be reviewed unless presented to and passed on by the trial court by some appropriate action during the trial, unless the finding is entirely without evidence to support it."

Steinhouser vs. Order St. Benedict, 194 *Fed.*, 289.

"The question of whether or not at the close of a trial there has been substantial evidence to sustain a finding in favor of the party is a question of law which arises in the trial. * * * It is raised by a motion for a judgment or a request for a declaration of the law, or any other action which presents this issue of law for the court to determine *before the trial ends.*"

Sun. Pub. Co. v. Lake Erie, etc. Co., 157 *Fed.*, 80.

Paul v. Delaware L. & W. Ry. Co. 130 *Fed.*, 954.

The record fails to show any such motion or request, or even a reservation of an exception to the judgment of the Court. It is true that the fifth and sixth assignments of error refer to a request made by the defendant that the District Judge give certain declarations of law; but the record fails utterly to show that any such requests were made or that any exception was reserved to the failure of the judge to declare the law as requested by the defendant.

Treating the declaration of the trial judge that the award of the Commission was *prima facie* evidence of all the facts stated therein as a finding of fact, it was a general finding, and cannot be reviewed in this Court.

U. S. Rev. Stat., 1011.

Chicago, G. W. Ry. Co. v. Minneapolis Etc. Ry. Co., 176 *Fed.*, 242.

Schmid v. Dolan, 167 *Fed.*, 804.

Union County Ntl. Bank v. Ozan Lbr. Co., 179 *Fed.* 710.

Dirst. v. Morris, 14 *Wall*, 490; 20 *Law Ed.*, 723.

"So, then, if there be any special findings of ultimate facts that are not agreed upon, there can be no review, under a general verdict, of the question whether the judgment is supported by the facts found."

National Surety Co. v. Cincinnati Etc. Ry. Co., 145 Fed., 35.

The final report of the Interstate Commerce Commission and the order issued thereon, found, as a matter of fact, that the rate charged by the railroads, twenty cents per hundred pounds, was unreasonable to the extent that it exceeded sixteen cents, the aggregate of the contemporaneously applicable intermediate rates based on Delta Point, La., that reparation was due the Anderson-Tully Company in the sum of $4,906.48, with six per cent interest from March 14, 1912, and the order was made on appellants here to pay the same. This report and order and Exhibit C were *the only evidence* submitted in the case, and, by the express terms of the Federal statute, were made *prima facie* evidence of all the facts stated in the award and order. No other evidence having been adduced, the District Court had nothing else upon which to base its judgment, and gave judgment for the amount of the award, interest, and a reasonable attorney's fee.

Besides, under the practice in Mississippi, defective

pleading can be challenged only by demurrer, both under the State statute and by decisions of its Supreme Court.

> "A judgment shall not be stayed or reversed, after verdict for any misleading or insufficient pleading."
>
> *Hemingway Ann. Code, Sec.* 596.
>
> "A demurrer is necessary to test the legal sufficiency of a pleading in all cases."
>
> *Marshall v. Hamilton,* 41 *Miss.* 229.
>
> "After verdict and judgment, no defect in the pleadings, which could have been taken advantage of by demurrer, will be noticed."
>
> *Whitaker v. Comfort,* W. 421.

In numerous cases before the Interstate Commerce Commission, it has been held that the through rate should not exceed the combination of the intermediate rates.

> *Sylvester v. Penn. R. R. Co.,* 14 I. C. C., 573.
>
> *Ryan v. G. N. Ry. Co.,* 18 I. C. C., 226.
>
> *Randolph Lbr. Co. v. S. A. L. Ry. Co.,* 14 I. C. C., 339.

This rule of practice was embodied in the Act of June 18, 1910, which prohibits a through rate being in excess of the aggregate of the intermediate rate.

Counsel for plaintiff has been unable to find any case reported in which the judgment of the Interstate Commerce Commission as to the reasonableness of a rate has been disturbed upon its being proved that an award of reparation was made and where no evidence to impeach the award was introduced by the guilty carriers. It would indeed be an anomalous situation if railroad carriers, after having thoroughly threshed out the questions presented for consideration to the Interstate Commerce Commission, could, when sued upon the award, be permitted to dispute the correctness of the Commission's findings, without the introduction of clear, cogent and convincing proof that the Commission was in error.

III.

The third specification of error is that the Court erred

in declaring the law to be that it could not inquire into or rule upon the question of the sufficiency of the evidence before the Interstate Commerce Commission to support its order of reparation sued upon herein, which evidence formed a part of that offered by the plaintiff in this case.

This assignment of error is utterly unsupported by anything to be found in the record. The District Judge did not declare the law to be that he could not inquire into or rule upon the question of the sufficiency of the evidence before the Interstate Commerce Commission, primarily, because no such evidence was ever submitted to him. The only thing submitted to the District Judge as *evidence* was the report of the Commission and its order thereupon; and the court, in the judgment handed down, found that this report and order were *prima facie* evidence of all of the facts stated therein; while in the bill of exceptions he stated that he held that—

> "*on the matter as submitted to the Court,* it can not go beyond the award."

The District Judge was entirely correct in both of these rulings, and the record now before this Court upon appeal shows affirmatively that none of the evidence, which was before the Interstate Commerce Commission and upon which it based its findings, was ever submitted to the District Court.

Brief, 39.

To raise the question the defendants would have had to except to the findings at the time and raised the question by a motion for judgment, or a request for a declaration, of law, or by some other action which would have presented the matter for determination by the court before the trial ended.

Sun Pub. Co. v. Lake Erie Etc. Co., 157 Fed., 80.
Paul v. Del. & W. Ry. Co., 130 Fed. 954.

Judge Grubb, in his opinion below, well covered this point (Record 79-80).

"We may say, however, that the Court properly

rendered judgment for the plaintiff in view of the state of the record. The judgment recites that the plaintiff offered the award and order of the Commission and rested, and that the defendants introduced no evidence. The Act of Congress gives to the award and order of the Commission prima facie effect, and it does this, regardless of the correctness or incorrectness of the findings of the Commission. The defendants are not permitted to destroy this prima facie effect by internal criticisms of the Commission's findings. The defendants have the right to overcome the prima facie effect of the findings of the Commission in a suit to enforce the award in the District Court only by offering evidence in that court tending to impeach their correctness. If the defendants offer no evidence to rebut the prima facie case made by the plaintiff's introduction of the award and order of the Commission then the District Court has nothing to do but apply the statute and render judgment for the plaintiff on the unrebutted prima facie case made by him. The Act of Congress provides that "on the trial of such suits, the findings and order of the Commission shall be prima facie evidence of the facts stated therein." The unreasonableness of the rate and the amount of plaintiff's damage caused thereby, are found by the Commission. The introduction of the award and order of the Commission showed prima facie that the rate was unreasonable and that the plaintiff was injured to the extent of the award. If the defendants declined to introduce evidence to rebut the plaintiff's case so made, the District Judge had no alternative than to render judgment. He did not rule that defendants could not rebut the prima facie case made by plaintiffs but that they had not done so, and, not having done so, that he was required to treat the plaintiff's

prima facie case, which was unrebutted, as entitling the plaintiff to a judgment."

IV.

A large part of the brief of counsel for defendants is devoted to an effort to show that the Commission erred in granting reparation to the plaintiff. In discussing his proposition learned counsel repeatedly refer to the evidence adduced before the Commission, not only in this case, but in the claim for reparation made against the Y. & M. V. Ry. Co. It is most earnestly submitted that this question is not before the Court; that the only question before this Court is whether or not there is any error in the judgment pronounced by the District Court for the Southern District of Mississippi on January 6, 1919. The District Court is not confined to a mere re-examination of the case as heard and reported by the Commission, but hears and determines the case *de novo* upon proper pleadings and proof, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.

In the case at bar the plaintiff set out that it had filed a formal complaint against the defendants before the Commission showing that the freight rate charged upon certain shipments of box-shooks from Vicksburg to Port Arthur was unreasonable to the extent that the rate charged, 20 cents, exceeded 16 cents, the aggregate of the contemporaneously applicable intermediate rates. The details of the shipments and the damages claimed were set out on Exhibit C to the complaint. That the Commission had found the through rate to be *unreasonable* as claimed, and had awarded reparation, as set out in Exhibits A and B to the complaint. The prayer of the complaint was that the court would hear and determine and adjudicate the matters involved in this cause *hereinabove recited and the Exhibits hereto attached.*

The Exhibits thereby become part of the pleading.

Weir v. Jones, 84 Miss., 610.
Hamer v. Rigby, 65 Miss., 41.
Moline Plow Co. v. Webb, 141 U. S. 616.

The defendants answered the complainant, admitting the rendition of the award, but alleging it was improperly and illegally made, thereby tendering this issue. If the complaint did not state a cause of action, this should have been raised by demurrer.

Marshall v. Hamilton, 41 Miss., 229.

After verdict and judgment, the objection comes too late.

Hemingways Ann. Code, Sec. 596.

Upon the hearing before the Court a jury having been waived, the plaintiff introduced in evidence the report of the Commission and rested. This report found, as a fact, that the through rate of 20 cents *was unreasonable* to the extent of 4 cents, being in excess of the two intermediates; that the damage suffered was $4,906.48, with interest from March 14, 1914. This report was *prima facie* evidence of these facts.

The defendants introduced no evidence.

The *prima facie* evidence thereupon became *conclusive* and the trial judge gave judgment in favor of the plaintiff.

It is respectfully submitted that there was no error in this proceeding, however much the Commission may have erred in the first instance. The defendants had their day in court to establish and demonstrate this error when the matter was up for determination before the District Court. They failed to do so and can not now be heard to say, upon appeal, that there was error in the finding of the Interstate Commerce Commission.

HARRY B. ANDERSON,
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